Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	)	CG Docket No. 02-278
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REPLY COMMENTS OF THE AMERICAN TELESERVICES ASSOCIATION

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SUMMARY OF COMMENTS

The American Teleservices Association ("ATA") urges this Commission to retain its title of "independent" regulatory agency and to avoid following the Federal Trade Commission's lead in adopting onerous new restrictions on telemarketing, including a national "do-not-call" registry. The comments in this proceeding confirm that, unlike the FTC, this Commission fulfilled its constitutional and statutory obligation to strike a proper balance between individuals' privacy rights and commercial freedoms of speech and trade when it first adopted rules implementing the Telephone Consumer Protection Act ("TCPA"). Although telemarketing clearly is a hot button issue that engenders emotional, sometimes hyperbolic calls for government to "do something" about the annoyance of unsolicited phone calls, in truth the problem is not as dramatic – and solutions need not be as drastic – as the opponents of telemarketing suggest.

The clamor for a national "do-not-call" rule rests largely on a perception that such a regime would be popular, and an assumption flowing therefrom that the current rules are inadequate. However, despite the Commission's request that the parties support their comments with empirical studies or other specific evidence, most advocates of a national "do-not-call" registry base their arguments on what they admit is anecdotal evidence, if they offer any evidence at all. Such demands ignore the Commission's actual experience with its rules as well as the amount of control over telemarketing the rules and other mechanisms afford consumers, not to mention the benefits of telemarketing.

Any claim of need for a national "do-not-call" registry is belied by evidence submitted in this proceeding, including:

- **Americans value teleservices.** About half of all surveyed households acquired at least one product or service over the telephone during the past year.
- **There is no telemarketing "epidemic."** The actual data submitted in this proceeding show that the average consumer receives between 1½ and 6 telemarketing calls a week. The higher figure was submitted by an advocate of banning all telemarketing calls, and it includes "teleservice call[s], survey call[s], courtesy call[s], fundraising call[s], care call[s], political call[s], appreciation call[s], [and even] leafy green vegetable call[s]."
- **Company-specific "do-not-call" rules work.** Companies devote substantial resources to compliance and maintain "do-not-call" lists with millions of names. Nearly three-quarters of consumers placing their telephone numbers on company-specific "do-not-call" lists found such actions to be effective.
- **The public wants a nuanced "do-not-call" approach.** A five-year analysis of a "do-not-call" list containing over 17 million names revealed that over 40 percent of households wish to receive calls from some commercial entities even though they preferred to block others.
- **Neither the FCC nor the FTC has a record of non-compliance under the rules.** Over seventy percent of the telemarketing complaints referenced in the NPRM did not involve "do-not-call" issues. Since December 1999, only two of 205 citations the Enforcement Bureau issued for alleged TCPA violations – about one percent – involved "do-not-call" claims. Similarly, the FTC's five year review of the Telemarketing Sales Rule revealed that only one in ten of the complaints it receives involve claims of unwanted calls.

This evidence, rather than the visceral response offered by commenters or the public, must guide the Commission's action in this proceeding.

In view of the evidence, it is clear that the Commission should make minor revisions, not sweeping changes to its rules implementing the TCPA. As the FTC's recent findings and various comments in this proceeding suggest, less drastic solutions than a national "do-not-call" list are available and could be implemented here. These measures include more effective enforcement of the existing rules, improved consumer

education, simplified procedures for signing up and/or verifying telephone numbers on company-specific "do-not-call" lists, facilitating the use of technical solutions, and easier complaint procedures.

Notably, none of these solutions have the drastic downsides that mark the prospect of a national "do-not-call" regime. A national registry would force consumers to make an all-or-nothing choice with respect to their receptiveness to telemarketing, which in no way reflects the nuanced reality of consumer preferences. It also seeks to remedy what are in reality petty annoyances with unwanted phone calls by creating a national database that carries with it true privacy problems. A national "do-not-call" registry also will harm the economy by devastating the teleservices industry and crippling efforts by competitive telecommunications carriers to win new customers. Indeed, the record reflects that some commenters' telemarketing sales have been reduced by 50 percent in states that have "do-not-call" lists, and that competitive entry in the market for local telephone service is up to 60% higher in states without a state "do-not-call" list. Perversely, the Commission will realize these detrimental results only by adopting a national "do-not-call" database that will be costly to establish and maintain, and which will be almost impossible to keep accurate.

Adoption of a national "do-not-call" registry also is complicated – and ultimately undone – by the fact that there is no way to reconcile the proposed national regime, or support for it in the comments, with state laws and FCC authority under the TCPA. Regulatory proponents have set forth myriad plans for a web of redundant and overlapping rules that somehow are to be administered jointly by state and federal agencies. Conversely, virtually all other support in the record for a national registry is

based on federal preemption of state "do-not-call" laws. To the extent the TCPA prevents the Commission from satisfying that condition precedent to support for a single, national regime, there is effectively very little support for a national "do-not-call" approach. No party offers any clear way to reconcile the impasse over the FCC's exercise of authority, if it were to adopt a national "do-not-call" list, with state authority and laws.

Regardless of actions the FTC has taken to amend its Telemarketing Sales Rule, the Commission must satisfy its independent statutory and constitutional obligation to deal with the First Amendment and economic questions a national "do-not-call" list raises, and to find a balanced solution. In this regard, the presumed popularity of a proposed restriction on speech is irrelevant to its constitutionality, and no estimate of public demand for new telemarketing restraints can validate rules that fail to preserve the required constitutional balance. Ironically, the FTC and other advocates of a national registry claim as its principal virtue precisely the reason courts usually strike down government restrictions – it prohibits more speech, rather than less.

The advocates of a national "do-not-call" registry claim that such a rule adheres to the First Amendment because it satisfies the test for regulating commercial speech in *Central Hudson*, and because any regulation of telemarketing in the name of residential privacy is constitutional under *Rowan v. Post Office* in that it effectuates individual homeowner preferences. But *Central Hudson* is not the appropriate First Amendment test where, as here, the purpose of the rules has nothing to do with commercial transactions *per se*, and even if that standard were applicable, a national "do-not-call" requirement would not survive constitutional scrutiny. In addition, any

application of *Rowan* that assumes blocking more speech in advance is a measure of a "do-not-call" program's success, and that seeking a statement of intent to bar calls from a particular solicitor is but a bothersome technicality, reflects a profound misunderstanding of a case that required just such an individualized intention. The proponents of a national "do-not-call" solution acknowledge that their preferred policy poorly approximates the actual desires of consumers. Consequently, the blanket preemptive approach they support is significantly over- and underinclusive, and thus invalid under basic First Amendment principles.

It is thus clear that a national "do-not-call" registry does not appropriately balance constitutional values. Contrary to the assumptions of the FTC and various commenters in this proceeding, the constitutional and statutory obligation to "balance" First Amendment rights under the TCPA cannot be met by favoring the speech of some telemarketers (*e.g.*, charitable, political or religious organizations) while limiting the rights of others (*e.g.*, most commercial callers). The only "balance" taking place is the government's decision that some commercial and non-commercial speakers are permitted to make unsolicited calls despite the no-call list, while entities blocked by a national "do-not-call" registry find their rights not balanced but rather extinguished. As a result, there can be no claim that a national "do-not-call" registry could be content neutral (and therefore perhaps constitutionally sound) given the TCPA's exemptions and exclusions. Rather, such an approach imposes a preemptive ban on certain disfavored classes of telemarketers, regardless of whether they have ever failed to respect a consumer's "do-not-call" request.

Given the above evidentiary, jurisdictional and constitutional problems confronting the adoption of any national "do-not-call" regime, the Commission should forego that approach in favor of refining its existing rules to reflect current conditions. In addition to the measures outlined above to make the existing rules more effective, the Commission should clarify the areas over which it has exclusive authority. This includes interstate telemarketing calls, which clearly fall within the ambit of "interstate communications" which this Commission has the exclusive power to regulate. The record makes clear that states will exceed their authority in this area if not restrained by the FCC. Notably, though many of the state commenters are emphatic regarding their power and intent to regulate in this area, none responds to the Commission's express inquiry in the NPRM to justify their authority in the face of FCC precedent and its staff's analysis to the contrary.

Next, the Commission must exercise preemptive authority over predictive dialers. The Commission has exercised exclusive jurisdiction over customer premises equipment ("CPE") in the past, and the TCPA gives it exclusive authority to regulate telemarketing technology. The Commission should rebuff the move by some states to regulate predictive dialers, especially given that the state commenters in this proceeding have indicated their intent to look to the FCC to regulate in this area. In so regulating, the Commission must take a cautious approach. It must clarify that predictive dialers are not ""automatic telephone dialing systems" under the TCPA or FCC rules implementing it, as predictive dialers lack the randomness or sequentiality that are the *sine qua non* of autodialer technology. The Commission should reject calls to explicitly prohibit the use of autodialers, or to do so implicitly by imposing a zero

percent abandoned call rate. These measures would cripple the teleservices industry, and in fact would run counter to the interests that proponents of a predictive dialer ban claim to support. The Commission should instead allow the industry's natural incentives and efforts to self-regulate to curtail predictive dialer abuse, or at most should codify the industry consensus of a five percent abandonment rate. Anything less would greatly undermine the effectiveness of predictive dialer technology and, by extension, of telemarketing campaigns generally.

Finally, the Commission should reduce the retention period for telephone numbers on company-specific "do-not-call" lists from ten to two years, and place telemarketing calls to wireline and wireless numbers on equal footing. Changes in the telecommunications industry, including the frequency with which consumers switch carriers, move their residences, and/or elect to rely on wireless technology for their primary phones all support these changes. The changes are necessary to ensure that company-specific "do-not-call" lists accurately reflect consumer preferences with respect to their receptiveness to telemarketing, and to ensure that the Commission's regulatory regime does not impose obligations on teleservices providers with respect to indistinguishable wireline and wireless telephone numbers.

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The American Teleservices Association hereby submits its reply to the comments filed in response to the Notice of Proposed Rulemaking in the captioned proceeding. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 17 FCC Rcd 17459 (2002) ("NPRM"). ATA notes that after initial comments were filed in this proceeding, the Federal Trade Commission ("FTC") amended its Telemarketing Sales Rule to impose new restrictions on telemarketing, including a national "do-not-call" registry and certain regulations of predictive dialers. Telemarketing Sales Rule; Final Rule, 68 Fed. Reg. 4579 (Jan. 29, 2003) (to be codified at 16 C.F.R. pt. 310). *See also* Telemarketing Sales Rule Statement of Basis and Purpose (FTC Dec. 18, 2002) ("SBP"). Nothing in the FTC's findings alters the FCC's constitutional and statutory duty to ensure that "individuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in such a way that protects privacy of individuals and permits legitimate telemarketing activities." Section 2(9), Pub. L. No. 102-243. As explained below, the FTC utterly failed to conduct the required balancing analysis, and it declined to analyze the facts before it. Similarly, nothing in the

record of the Commission's current proceeding justifies the adoption of rules like those recently announced by the FTC.

PRELIMINARY STATEMENT

Almost everything in this rulemaking proceeding has been greatly exaggerated. The extent to which unsolicited telephone solicitations have become a serious problem demanding a national response has been driven more by generalization and hyperbole than by citation to verifiable facts. The FCC's current regulations have been presumed inadequate by advocates of a national "do-not-call" list without regard to the Commission's actual experience with the rules, and notwithstanding the possibility that existing regulations might be strengthened without such a drastic solution. Regulatory proponents have set forth myriad plans for a network of redundant and overlapping rules of Rube Goldberg complexity that somehow are to be administered jointly by state and federal agencies. And, despite a statutory mandate that requires the FCC to strike a careful balance between consumer preferences and the right to free speech, there has been a sense of inevitability to this proceeding that is worthy of Lewis Carroll. 1/

Most statements of support for a national "do-not-call" regime appear to follow from the perception that such rules would be popular. Indeed, in assessing the FTC's recently adopted amendments to its Telemarketing Sales Rule, including a

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1/ *Compare* Lewis Carroll, ALICE'S ADVENTURES IN WONDERLAND Ch. 12 (1865) ("'No, no!' said the Queen. 'Sentence first, trial afterwards.'") *with* Caroline E. Mayer, *Tauzin Reverses Stand on Do-Not-Call List*, WASHINGTON POST, January 9, 2003 at E4 ("K. Dane Snowden, chief of the FCC's bureau of consumer and governmental affairs, said both agencies [the FTC and FCC] are 'going to make sure we don't contradict one another as we go forward.'").

requirement for a national "do-not-call" registry, Congressman Edward Markey described the agency action as a "runaway smash box office hit." 2/ But such superficial claims regarding the rule's broad appeal, even assuming they are accurate, do not relieve the Commission of its statutory and constitutional obligation to deal with economic and First Amendment questions and to find a balanced solution. Quite simply, the presumed popularity of a proposed restriction on speech is irrelevant to its constitutionality. 3/ For example, surveys have found that up to three-quarters of respondents are annoyed by people who use their wireless phones in public and would support laws to restrict public conversations, despite the obvious constitutional defects of any such measures. 4/ By the same token, estimates of public demand for regulation of telemarketing will not validate rules that fail to preserve the required constitutional balance. 5/

2/ Comments of Congressman Edward Markey, Briefing Before House Commerce Committee on the FTC's Amendments to the Telemarketing Sales Rule, January 8, 2003. *See also* National Association of Attorneys General ("NAAG") at 6.

3/ See, *e.g.*, *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818, 826 (2000) ("The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly" but the government cannot restrict such speech "even with the mandate or approval of a majority."). *Cf*. *Board of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (restriction on speech cannot be imposed by referendum).

4/ *See*, *e.g.*, Dave Carpenter, *Cell Phones: They're All the Rage*, USA TODAY, August 1, 2000 (73 percent of 5,300 respondents to question posted by San Diego Mayor said they would support restricting cell phones in public places); Maria Godoy, *The Sounds of Silence*, ABCNEWS.com, August 16, 2001 (reporting survey in which 57 percent of respondents favored restricting cellular phones in public places).

5/ The state attorneys general and other proponents of a national "do-not-call" registry assert that no one has a right to broadcast offensive messages into the home, citing *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970). *See*, *e.g.*, NAAG at 5. However, the postal regulation upheld in *Rowan* operates like the company-specific "do-not-call" requirement of the existing rules, and not like a national registry where the

In addition to its duty to uphold the Constitution, the Commission must keep in mind that popularity contests are a notoriously bad way to make public policy. Again, as illustrated by the widespread hostility to public cell phone use, some forms of communication provoke exaggerated responses that do not accurately reflect reality. Professor James Katz, a Rutgers University communications professor who specializes in cell-phone behavior has described a "knee-jerk reaction" in which "some people just are conditioned to despise cell phones" even if the users are quiet and discreet (and in spite of the fact that nearly two-thirds of U.S. households have at least one wireless phone). 6/ By the same token, the manifest hostility to all telemarketing reflected in some of the comments filed in this proceeding represents just such a "knee-jerk" reaction that should put the Commission on its guard. 7/ Given the number of petty annoyances in modern life, it is quixotic to try to regulate pet peeves, even if they can be fully understood and kept in perspective. In this case, proper perspective cannot be gleaned from the intensity of some commenters' visceral reactions to telemarketing as a practice, and must instead take into account the public's actual use of teleservices.

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government selects which calls will be banned. The record in this proceeding demonstrates that a national registry will frustrate individual preferences. *See infra* pp. 20-22.

6/ Associated Press, *Researchers, Pedestrians Offer Reasons to Hate Cell-Phone Talkers*, PORTSMOUTH (N.H.) HERALD, October 10, 2000. *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Services*, 17 FCC Rcd 12985, 13013 (2002) ("*2002 CMRS Competition Report*").

7/ As the Commission well knows, those who file comments in a rulemaking proceeding of this type are, by definition, highly self-selected. But here, the effect is even more pronounced where state officials have used their "do-not-call" lists to solicit comments from residents. *See* ATA Comments, Ex. 9 (Spam email from Indiana Attorney General Stephen Carter).

See ATA Comments 9-18. In short, the Commission must focus on actual evidence, and not attitudes. 8/

I. THE RECORD DOES NOT SUPPORT ADOPTION OF A NATIONAL "DO-NOT-CALL" REGISTRY

A. The Record Does Not Show an "Epidemic" of Unwanted Calls

The intensity of the demand for a national "do-not-call" list among its policy aficionados far exceeds any factual basis for such an extreme solution. Various commenters describe the current situation and the increasing number of calls as an "emergency," a "scourge," and an "epidemic," but such comments themselves are long on adjectives and very short on facts. 9/ Despite the Commission's request that the parties support their comments with empirical studies or other specific evidence, NPRM ¶ 16, most of the extravagant claims about purported abuses are based on what commenters admit is "[a]necdotal evidence," City of Chicago at 5, if any evidence is

8/ *See*, *e.g.*, NPRM ¶ 16 ("Parties are strongly encouraged to provide empirical studies or other specific evidence whenever possible to support their arguments."). Such encouragement is not merely good regulatory practice – it is constitutionally required in a case like this one. *E.g.*, *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000) ("[w]e have never accepted mere conjecture as adequate to carry a First Amendment burden"); *Weinberg v. City of Chicago*, 310 F.3d 1029, 1039 (7th Cir. 2002) ("Using a speech restrictive blanket with little or no factual justification flies in the face of preserving one of our most cherished rights.").

9/ *E.g.*, City of Chicago at 7 (recipients of unwanted calls are "victims" of telemarketing, and there is a "telemarketing crisis"); Mathemaesthetics, Inc. at 6 (voice telemarketing is a "scourge" and predictive dialing enables "behavior that is no different from common telephone stalking"); NAAG at 6, 25 (national registry needed to prevent a form of trespass); National Consumer League at 3 (consumers are "besieged" by telemarketing); Comments of Joe Shields at 4 ("telephone solicitations have become epidemic").

offered at all. Significantly, what little data is offered by state regulators suggests that only a small percentage of telemarketing complaints they receive have any merit. 10/

Such hyperbolic claims fail to provide any insight as to the actual problem caused by telemarketing or how difficult it is for the average person to use one of the various tools available to exercise control over incoming calls. However, the record does contain some specific facts. For example, DialAmerica Marketing, Inc. ("DialAmerica"), who opposes a national "do-not-call" registry, states that the average consumer receives 82 telemarketing calls per year, or about one and a half calls per week. DialAmerica, Inc. at 10. At the other extreme, Joe Shields, the Texas Government & Public Relations Spokesperson for Private Citizen, Inc. (an organization that urges the FCC to disregard the First Amendment rights of the teleservices industry), monitored and logged teleservices calls from all sources during a three-year period and found he received fewer than six calls per week from all sources, including political and charitable organizations. 11/ This he described as an "epidemic." Shields at 4.

10/ *Compare* Tennessee Regulatory Authority/Tennessee Attorney General ("TRA/TAG") at 3 (1,789 consumer complaints alleging "do-not-call" violations since 1999), and Texas Public Utilities Commission ("Texas PUC") at 3 (3,800 "do-not-call" complaints since July 2002), *with* National Association of Regulatory Utility Commissioners ("NARUC") at 4 n.3 (4,000 consumer complaints led to only thirteen formal actions and several hundred notices of potential liability).

11/ Shields logged 212 telephone solicitations to one of his telephone lines during the three-year period from August 1999 through August 2002. However, it is impossible to tell how many of these calls might be in violation of the TCPA rules, since Shields does not indicate whether the line he monitored was a business or a residential line. The vast majority of the calls logged (76 percent) were prerecorded messages, and Shields does not say how many calls came from entities to which a "do-not-call" request had been made. Nor does he say how many of the calls came from commercial entities. In its comments, for example, Private Citizen (Shields' organization) argues that all unsolicited calls, whether designated as a "teleservice call, survey call, courtesy call, fundraising call, care call, political call, appreciation call, or a leafy green vegetable call, is a telemarketing call in the eye of the called resident." Private Citizen, Inc. at 4-5.

But what is one person's epidemic is another person's trickle. Such extreme divergent reactions to the prospect of receiving a few unwanted calls per week (even if *no* action is taken to control incoming calls) demonstrates vividly the extent to which this proceeding is faced with an "eye of the beholder" problem. This brings to mind a scene from the movie *Annie Hall*:

Alvy's Psychiatrist

How often do you sleep together?

Alvy

Hardly ever. Maybe three times a week.

Annie's Psychiatrist

Do you have sex often?

Annie

Constantly! I'd say three times a week. 12/

Needless to say, it is not a good thing for the FCC when its rulemaking record begins to sound like a Woody Allen movie. Accordingly, the outcome of this proceeding should be based on facts, not emotional outbursts.

B. The Teleservices Industry Overwhelmingly Complies With Company-Specific "Do-Not-Call" Requirements

Whatever the actual number of calls may be, existing rules give consumers the ability to control incoming calls. The record confirms that the company-specific "do-not-call" rule gives consumers an adequate means of preventing unwanted

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It further asserts that "George W. Bush took it upon himself to join in the illegal trampling of our privacy when his recorded voice was used to promote Republican candidates." *Id*. at 4. Accordingly, it appears a substantial portion of the calls logged by Mr. Shields fall outside the reach of the FCC's rules.

12/ *Annie Hall*, written by Woody Allen and Marshall Brickman.

calls while preserving the right of businesses to use the telephone for legitimate and protected speech. 13/ The comments support ATA's position, ATA at 43-44, that the current rules provide businesses and other entities ample incentive to honor consumers' "do-not-call" requests. 14/ Indeed, businesses who must serve the public recognize that it is "counter-intuitive to sound business sense" for firms to ignore consumers' "do-not-call" requests, because it wastes resources to solicit consumers who have expressed a particular disinterest in that firm's products and services. *See* BellSouth at 3-4; WorldCom at 39. Not surprisingly, this commonsense proposition has motivated firms to establish effective procedures and policies to prevent calls to consumers who do not want to take their calls. 15/

The comments demonstrate that firms take their "do-not-call" obligations seriously, and have devoted substantial resources to satisfying them. 16/ AT&T Wireless, for example, allows consumers to add themselves to the company's "do-not-call" list in a variety of ways, including a web-based "Do Not Contact Me" form that

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13/ *See, e.g.*, American Bankers Association at 2; BellSouth Corp. at 1-4; Cingular Wireless, LLC, at 4; Colorado Public Utilities Commission ("Colorado PUC") at 3; Convergys Corp. at 4; Consumer Bankers Association at 3; Direct Marketing Association ("DMA") at 35; Electronic Retailing Association at 3, 5; Household at 2; Intuit, Inc. at 4; Magazine Publishers of America ("MPA") at 5-7; MBNA America Bank ("MBNA") at 4-5; Mortgage Bankers Association of America at 2; National Energy Marketers Association at 7; Newsletter & Electronic Publishers Association ("NEPA") at 2; Newspaper Association of America at 2-3; Oregon Telecommunications Association at 2; Qwest Services Corp. ("Qwest") at 2; Seattle Times at 1; SBC Communications, Inc. ("SBC") at 4-15; Scholastic, Inc. at 4; Sprint Corp. at 2; WorldCom, Inc. at 38.

14/ *See, e.g.*, BellSouth at 3-4; AT&T Wireless Services, Inc. ("AT&T Wireless") at 5 ("do-not-call" program has strengthened relationships with subscribers).

15/ *See, e.g.*, American Red Cross ("Red Cross") at 4; AT&T Wireless at 5; Sprint at 1, 3.

16/ *See, e.g.*, AT&T Wireless at 5; Sprint at 2-4; Verizon, Inc. at 3-5.

permits consumers to opt-out of unwanted marketing via a number of media. AT&T Wireless at 5. Company-specific "do-not-call" programs are clearly working, and they include millions of names. 17/ Sprint, for example, indicates that it has received few complaints from consumers alleging noncompliance with "do-not-call" requests. And in most cases any complaints Sprint has received regarding alleged "do-not-call" violations have turned out to be "false-positives." Sprint at 3-4. ("In many cases, it turns out that the consumer had requested DNC for a telephone number other than the one at which he had just been called (*e.g.*, the number at his previous residence), or that the telemarketing call occurred shortly after the DNC request was received and was being processed."). 18/ In short, the current rules are largely working as intended.

Most of the commenters that find fault with the company-specific approach complain mostly about its relative convenience, not its overall effectiveness. 19/ These comments claim that the current rules place "undue burdens"

17/ *See, e.g.*, DialAmerica at 5 (17.2 million numbers are on "do-not-call" list and 2.5 million numbers are added annually); Verizon at 4-5 (more than 3 million numbers added this year); Verizon Wireless at 3; Sprint at 3 (approximately 10 million numbers).

18/ Similarly, Missouri provided testimony to the FTC indicating that about 40 percent of the complaints it receives are false positives, including complaints directed toward exempt organizations and other irregularities. *See* FTC, *Transcript of Amendment to the Telemarketing Sales Rule Forum held on June 5, 2002*, p. 206, at http://www.ftc.gov/bcp/rulemaking/tsr/020605xscript.pdf.

19/ Comments criticizing the company-specific "do-not-call" approach have difficulty identifying any significant, specific failing of the current regime. One theme that runs through some criticisms of the existing company-specific approach is that telemarketers do not fully internalize their costs of doing business. *See, e.g.*, Electronic Privacy Information Center, et al. ("EPIC") at 10; National Consumers League at 4; NAAG at 6-7, 22. However, these comments fail to acknowledge that some of these externalities are positive and result from the balance Congress intended to strike when it passed the TCPA. As mentioned by ATA and other commenters, telemarketing is beneficial for consumers because it provides convenient access to a wide variety of goods and services, gives consumers valuable information on goods and services, and keeps

on consumers 20/ because they must actually make their preferences known, 21/ and must repeat their "do-not-call" requests to each unwanted caller. 22/ However, such complaints about the "inconvenience" of the current approach also ignore what many commenters acknowledge as its prime virtue – that company-specific lists give consumers the greatest control over telemarketing because it allows them to make individualized, rather than global, decisions about solicitors and solicitation calls. 23/ Verizon speaks for a majority of commenters when its points out that the company-specific approach allows consumers to "manage precisely from whom they receive calls and from whom they do not." Verizon at 4. It was the ability to make such individualized choices that prompted the Commission in 1992 to adopt a company-specific requirement rather than a national "do-not-call" regime. *Rules and Regulations Implementing the Telephone Consumer Protection Act*, 7 FCC Rcd 8752, 8761 (1992) ("*TCPA Report & Order*") (a national "do-not-call" requirement will not help telephone

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prices down. *See, e.g.*, Call Compliance, Inc. at 6; DMA at 2-3; Nextel Communications, Inc. ("Nextel") at 2-3; WorldCom at 3-4. *See also* ATA at 15.

20/ *See, e.g.*, City of Chicago at 3; EPIC at 10; Intrado, Inc. at 5; National Consumer League at 3; New York State Consumer Protection Board ("NYCPB"), *Other Than Do-Not-Call* at 3; North Dakota Public Service Commission ("North Dakota PSC") at 1; Office of the People's Counsel for the District of Columbia ("D.C. Counsel") at 3; Texas Office of Public Utility Counsel ("TOPUC") at 7.

21/ City of Chicago at 4 (consumers "must talk" to telemarketers "to stop them from doing what they were created to do").

22/ *See, e.g.*, City of Chicago at 4; EPIC at 10; Intrado at 5; NAAG at 29; National Consumer League at 3; NYCPB, *Other Than Do-Not-Call* at 2; North Dakota PSC at 1-2; D.C. Counsel at 3; TOPUC at 7-8.

23/ *See, e.g.*, American Bankers Ass'n at 2; MBNA at 5; Electronic Retailing Ass'n at 3; Household at 2; Intuit at 4; MPA at 7; NAAG at 7; Newspaper Association at 6; Reese Brothers, Inc. at 15; TOPUC at 2; Verizon at 4; WorldCom at 6, 38-39.

subscribers who, "by and large would like to maintain their ability to choose among those telemarketers from whom they do and do not wish to hear"), *recon. granted in part*, *denied in part*, 10 FCC Rcd 12391 (1995) ("*TCPA Recon. Order*")

Unable to identify flaws inherent in the company-specific approach, some commenters simply repeat the data cited in the NPRM that prompted initiation of this rulemaking. 24/ Others base their support for a national "do-not-call" list on the notion that anything that increases the amount of regulation telemarketers face must be good. 25/ This pro-regulation mindset ignores that the TCPA requires the Commission to balance the potential benefits of new regulation, if any, against the burdens on telemarketers and the limitations on protected speech. 26/ As SBC pointed out, "Congress directed the Commission to consider various alternatives to effect [a] balance" between consumers' privacy rights, public safety interests, and commercial freedoms of speech. SBC at 1. Those who advocate more regulation for its own sake ignore this statutory and constitutional imperative.

Even where some commenters tried to make a showing that the current rules are ineffective, they typically did little more than reason backwards from their perception of popular support for alternative "do-not-call" schemes to a conclusion that

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24/ *See, e.g.*, Public Utilities Commission of Ohio ("PUCO") at 13-14; TOPUC at 7. *See also* Intrado at 5. As noted below, however, the Commission's reference to telemarketing complaints in the NPRM did not provide support for the adoption of a national "do-not-call" regime. *See* ATA at 35-40; *see also infra* 13-14.

25/ *See, e.g.*, PUCO at 13-14; TOPUC at 7. *See also* Intrado at 5.

26/ *See, e.g.,* ATA at 19-23; SBC at 1; WorldCom at 3, 17.

the current rules are ineffective. 27/ These commenters offer no evidence to support their assumptions that the company-specific rules are not working. For example, NAAG asserts that the number of violations of state "do-not-call" laws are "only the *tip* of the proverbial iceberg," NAAG at 20 (emphasis in original), but it can muster no more than a few sentences in the span of several pages in trying to describe specific problems with the company-specific approach. *Id.* at 7, 21-30. Ultimately, their conclusions are nothing more than a reflection of their policy preferences, not logical propositions based on the evidence. 28/ None of their suppositions can compare to the survey data submitted by ATA in this proceeding which demonstrates that nearly three-quarters of consumers who place their numbers on company-specific "do-not-call" lists found such actions to be effective. 29/

27/ However, these comments lack evidence even to support their claims about popular sentiment. *See, e.g.*, City of Chicago at 5 (stating that "[a]necdotal evidence suggests strongly that consumers are seeking an easier way to place themselves on the multitude of do-not-call lists" and "[t]here is clearly a consumer demand for a method of simultaneous registration on many do-not-call lists or a single comprehensive list"); EPIC at 3 ("public opinion clearly supports an opt-in system for information collection and sharing"); National Consumers League at 3 (stating that "[i]f consumers were satisfied with the company-specific do-not-call approach, there would not be so much demand for other alternatives"); NYCPB, *Other Than Do-Not-Call* at 2-4 ("New York has found that consumers would rather have a 'one-stop' do-not-call program[.]").

28/ Similarly, there is no merit to Ohio's claim that predictive dialing technology has hampered the company-specific approach. PUCO at 14. As a threshold matter, PUCO provides no explanation for its sweeping assertion. However, its assumption that the efficiencies gained by use of predictive dialing technology have increased the volume of unwanted calls that consumers receive is wrong, because predictive dialing technology facilitates compliance with "do-not-call" requests. *See* SBC at 6 (consumers need only ask firms once not to be called again). In any event, concerns about dialing technology surely can be remedied by measures far short of implementing a national "do-not-call" program. *See, e.g.*, ATA at 115; Convergys at 6; DMA at 30-34; TOPUC at 4.

29/ *See* Marketing Survey of Consumer Attitudes Regarding Telemarketing, Exhibit 12 to ATA Comments.

C. The Federal Government's Experience With its Current Telemarketing Rules Does Not Support a Major Overhaul

1. FCC Experience With the TCPA

The Commission's enforcement record under the TCPA does not show any significant problem with the company-specific "do-not-call" rules. When the FCC pointed to "over 11,000 complaints about telemarketing practices" at the outset of this proceeding, NPRM at ¶ 8, ATA sought copies of those complaints pursuant to a Freedom of Information Act request and challenged the assumption that a listing of general "telemarketing" complaints was somehow indicative of actual "do-not-call" violations. 30/ Although ATA has been able to gain access to a certain portion of the complaints on which the Commission relied in formulating the NPRM, the rate at which the Commission is making documents available has slowed, raising question of whether they will be released during the pendency of the rulemaking. 31/ However, preliminary analysis of the complaints made available during the comment period shows that

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30/ *See* ATA at 35-43. The Commission often notes it "receives many complaints that do not involve violations of the [Act] or a FCC rule or order," and it has stressed that "a complaint does not necessarily indicate wrongdoing." *Report on Informal Consumer Inquiries and Complaints, 2nd Quarter Calendar Year 2002* (CGB Oct. 15, 2002).

31/ Since ATA submitted its initial comments in December, the processing of its FOIA request has slowed to a trickle. On December 13, 2002, in response to ATA's Application for Review of FOIA Action questioning the staff's determination that it would take six to eight months at a cost of $25,000 for ATA to get a chance to review the complaints, the Consumer & Governmental Affairs Bureau ("CGB") informed ATA that it would stop processing ATA's FOIA request absent further assurances that ATA would pay the demanded fees. *See* Letter from Dane Snowden, Chief, Consumer & Governmental Affairs Bureau, Dec. 13, 2002. On December 17, 2002, ATA filed a Motion for Expedited Review of its Application for Review, seeking prompt action by the Commission to relieve ATA from having to agree to pay fees it believes are illegitimate. *See* ATA Motion for Expedited Review. To date, this request has gone unanswered, even though the anticipated date for responding to ATA's Application for Review has long passed. *See* 47 C.F.R. § 0.461(k). However, by agreement, approximately 2,650 of the 11,000 complaints have been made available so far.

almost three quarters relate to issues other than "do-not-call" problems. 32/ Of course, because false-positives inflate the number of "do-not-call" complaints, the percentage of *actual* "do-not-call" violations is likely even lower. 33/

Additional data recently released by the Commission further confirm that the NPRM's tendency to equate complaints with rule violations was greatly exaggerated. Since December 1999 the Enforcement Bureau has issued 205 citations for alleged violations of the TCPA. 34/ During this same period, however, the Bureau issued only two citations for alleged failures to honor "do-not-call" requests. *Id.* In other words, only one percent of all of TCPA-related citations for a two-year period were related to the principal topic of this rulemaking. *Id.* This means that Bureau found only two "do-not-call" violations during roughly the time period in which it received the 11,000 telemarketing complaints that were cited as justification for this proceeding. *Compare* NPRM at ¶ 8, *with* FCC Press Release. The Bureau's enforcement record suggests that telemarketers generally are making substantial and successful efforts to comply with the Commission's rules.

32/ Analysis of the first 465 complaints revealed that about two-thirds related to issues other than unwanted calls. *See* ATA, Ex. 16. Now, however, the FCC has made available 2,653 complaints, and the proportion devoted to "do-not-call" issues has dropped. Seventy-two percent of the complaints relate to issues other than unwanted calls and are irrelevant to the question of a national registry.

33/ *See*, *e.g.*, Sprint 3-4 (noting high number of false-positives); Texas Public Utilities Commission ("Texas PUC") at 3.

34/ Press Release, FCC, *Telemarketing Enforcement Actions Announced,* at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-230145A1.pdf (January 9, 2003) ("FCC Press Release").

2. FTC Experience With the Telemarketing Act

The FTC's experience with enforcing the Telemarketing Sales Rule similarly reveals that "do-not-call" issues have not been a significant problem. In its five-year review of the TSR rules, the FTC informed Congress that unwanted telemarketing calls generated relatively few complaints. In June 2000, Eileen Harrington, the FTC's Assistant Director of Marketing Practices, testified "we took a look at our own complaint data base and [found] that while we have a lot of complaints about telemarketing, almost all of them concern allegations of fraud. *Only about 1 in 10 of the complaints that we have concern unwanted calls*." The Know Your Caller Act of 1999 and the Telemarketing Victim Protection Act of 1999: Hearing Before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the House Committee on Commerce, 106th Cong. 106-117 (2002) (Statement of Eileen Harrington) (emphasis added). That is, for the vast majority of telemarketers who are honest and follow the rules, 90 percent of the complaints filed at the FTC are irrelevant, and have no bearing on this proceeding.

An independent review of FTC complaints conducted by ATA is showing similar results. On November 1, 2002, ATA requested access to telemarketing complaints received by the FTC during the past five years. 35/ The FTC promptly responded to this request, and is providing copies of complaints on an ongoing basis. 36/ Thus far ATA has received a total of 671 telemarketing complaints from the

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35/ Letter to Office of General Counsel, FTC, November 1, 2002. *See also* ATA Application for Review of Freedom of Information Act Action at 13.

36/ Letter from Joan Fina, FTC, Nov. 12, 2002; Letter from Joan Fina, FTC, Jan. 21, 2003. *See also* ATA Application for Review of Freedom of Information Act Action at 13.

FTC, and found that nearly 80 percent relate to issues other than unwanted telemarketing calls. The number of "do-not-call" complaints submitted to the FTC is dwarfed by the amount of complaints it has received about general deceptive and unfair trade practices, most of which – 575 out of 671 – have nothing to do with telemarketing. 37/

In its recent order adopting a national "do-not-call" registry, the FTC concluded that the company-specific approach had been inadequate, but most curiously omitted any reference to its actual enforcement experience. SBP at 135-140. Instead, the agency uncritically accepted the claims submitted by a number of commenters to the proceeding that the company-specific approach had failed. 38/ Specifically, these commenters criticized the previous rule as being "extremely burdensome" to consumers who must repeat their "do-not-call" requests to various callers, that requests to be placed on "do-not-call" lists were ignored, that consumers could not verify whether their numbers were on a company's "do-not-call" list, that the TCPA's private right of action is complex and time-consuming, and that judgments won

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37/ The FTC sorts complaints into nearly twenty non-exclusive categories: advance fees for loan, credit repair, deception or misrepresentation, failure to disclose identity, failure to disclose sales call, failure to disclose total costs, failure to provide disclosure in language consumer understands, inquiry about a company, prize-related failures to disclose (no payment necessary, rules, or conditions), telephoning repeatedly, threats, intimidation, abusive language, and unauthorized carrier switch. By contrast, the FCC sorts complaints into only four specific categories: artificial or prerecorded messages and/or auto dialers, do-not-call violations, fax complaints, and time of day violations.

38/ The FTC's evaluation of the comments is strangely inconsistent. It claimed that there was "overwhelming support" of a national list because 33,000 out of 49,000 commenters (about 67 percent) advocated such a policy. SBP at 133 n.575. Yet the FTC retained an exemption for calls from entities with an established business relationship even though it acknowledged that most individual consumers who filed comments on the issue – approximately 60 percent – opposed such an exemption. *Id*. at 145-146. It appears that what the FTC considers persuasive evidence, or what it believes is "overwhelming," takes a back seat to its policy predispositions.

in court are hard to enforce. *Id*. at 135-136. The FTC made no attempt to quantify the extent to which the company-specific approach had failed – *e.g.*, how often "do-not-call" requests are not honored – nor did it describe its own efforts to enforce the rule.

D. At Most, the Record Supports Minor Changes in the Current Rules

None of the purported shortcomings of the FCC's current company-specific "do-not-call" requirements provide a basis for adopting a national registry. Indeed, as the FTC's recent findings and the various comments filed in this proceeding suggest, far less drastic solutions are available and could be implemented in the instant proceeding. Specifically, such measures include greater enforcement of existing rules, consumer education, simplifying procedures for signing up and/or verifying a telephone number on a "do-not-call" list, rules to improve the effectiveness of technical solutions, and simplified complaint procedures.

Enforcement. Even some of the most ardent supporters of a national "do-not-call" list indicate that the company-specific requirement would work if enforced. 39/ Indeed, the comments generally agree that active enforcement of the current rules may well be the best way to resolve residual problems with or any other perceived shortcomings of the current approach. 40/ The state regulatory commissions

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39/ *E.g.*, Shields at 2. This assumes, of course, that there is widespread non-compliance, an assumption unsupported by the record or the Commission's enforcement history. However, to whatever extent some telemarketers have failed to follow existing rules, a rational place to start reform would be to bolster enforcement.

40/ *See, e.g.*, American Bankers Ass'n at 7 (any problems with the current approach "should be remedied with enforcement, not new requirements"); NARUC at 4; BellSouth at 2 (greater enforcement would deter practices that lead to FCC inquiries and complaints); Sprint at 2, 4 (Commission should "direct its resources to enforcement activity targeted at companies that it suspects or knows are in violation of existing rules[ ]").

suggest that enforcement efforts have led to fewer telemarketing complaints. NARUC at 4 & n.3. Thus, any concerns about callers' failing to identify themselves, telemarketer failure to allow consumers to lodge "do-not-call" requests, and the need for consumers to rely on telemarketers to correctly interpret and comply with "do-not-call" requests all can be addressed under the current rules. 41/ The FTC, for example, underscored the extent to which its enforcement efforts have helped reduce instances of certain other abusive practices. 42/ There is no reason to believe that effective enforcement of "do-not-call" rules would not similarly resolve any perceived problems in this area.

Consumer Education. A number of the comments suggest that one problem with the existing company-specific rules is that consumers may be unaware of their rights. 43/ In this regard, the Commission has taken steps to increase consumer awareness of the rules, 44/ and the NPRM asks whether such efforts could be enhanced. The Commission has noted that "the effectiveness and value of any [list is]

41/ *See, e.g.*, EPIC at 4; City of Chicago at 3-4; NAAG at 7; National Consumers League at 3; NYCPB *Other than Do-Not-Call* at 2; North Dakota PSC at 2.

42/ *See*, *e.g.*, SBP at 94 n.403 ("The Commission's efforts against [credit] recovery rooms have borne fruit. The volume of consumer complaints concerning recovery rooms logged into the FTC Telemarketing Complaint System in 1996 plummeted to 153 – less than one-fifth the record high volume of 869 complaints recorded in 1995.").

43/ *See, e.g.*, Robert Biggerstaff at 7; J. Melville Capps at 2; EPIC at 4; NAAG at 21; Shields at 1-2.

44/ *See* Press Release, FCC, *New Year's Resolution for Telecom Consumers*, Dec. 31, 2002, at http://ftp.fcc.gov/cgb/news/resolutions.html (admonishing consumers to familiarize themselves "with the rules about telemarketing calls, including when the calls are allowed, the information the caller must give, how to get on the caller's do-not-call list, and what [they] can do if calls continue"). *See also* FCC, *Unwanted Telephone Marketing Calls*, at http://www.fcc.gov/cgb/consumerfacts.tcpa.html (last updated May 21, 2002).

contingent upon an informed public." NPRM ¶ 54. In particular, it sought comment on industry initiatives to better inform consumers of their right to be placed on a company's "do-not-call" list. *Id*. ¶ 17. Even the FTC has acknowledged that consumer education plays an important role in the effectiveness of "do-not-call" rules. SBP at 141. In this regard, ensuring that consumers are fully aware of their rights under existing law seems to be the least burdensome way of ensuring the rules' effectiveness.

Rule Adjustments and Improved Network Technologies. Various possible modifications to the existing rules directly address some of the supposed shortcomings of the company-specific approach. For example, the Commission requested "specific comment on whether companies should be required to provide a toll-free number and/or a website that consumers can access to register their name on the do-not-call list." NPRM ¶ 17. It asked whether companies should be required to respond to requests for information about their lists "or otherwise provide some means of confirmation so that consumers may verify that their requests have been processed." *Id*. The Commission also sought comment on improvements in network technologies that give consumers greater control over incoming calls, and asked whether it should "require telemarketers to transmit the name and telephone number of the calling party, when possible, or prohibit them from blocking or altering the transmission of such information." 45/ Such rule modifications would assuage commenters' concerns about the company-specific approach and are far less drastic than imposing a national "do-not-call" list.

45/ NPRM ¶ 22. The FTC noted that nearly half of all Americans subscribe to Caller ID service. SBP at 127 n.533.

Simplified Complaint Procedures. Complaints about the effectiveness of private lawsuits to enforce the TCPA overlook the fact that the law may be enforced in various ways. In addition to private rights of action, Section 227 may be enforced by state officials and by the FCC. Plus, FTC enforcement actions may also be brought under the Telemarketing Act. As a consequence, complaints about the difficulty of bringing a private action fail to even scratch the surface of the available remedies. In any event, the Commission's proposal to make TCPA complaints subject to its informal complaint rules should be more than adequate to deal with any such concerns. As the Commission has noted, doing so would "establish a unified, streamlined process" that avoids "requir[ing] consumers to navigate an array of rule provisions and disparate procedures . . . in order to file complaints." *Establishment of Rules Governing Procedures to be Followed When Informal Complaints are Filed by Consumers Against Entities Regulated by the Commission*, 17 FCC Rcd 3919 (2002). ATA supported this change in its initial comments. ATA at 136-138.

II. A NATIONAL "DO-NOT-CALL" LIST WOULD BE BAD POLICY

Not only is a national "do-not-call" registry unnecessary to enable consumers to control incoming calls, such a blanket solution would fail to serve the consumers it is designed to protect. It also would trade minor annoyances for genuine privacy problems. And, it would have devastating economic consequences.

A. The All-or-Nothing Approach of a National "Do-Not-Call" Registry Fails to Capture Consumer Preferences

The proposed one-size-fits-all "do-not-call" registry will have the untoward consequence of frustrating consumer autonomy by forcing consumers into one of two extreme positions regarding telemarketing calls. Consumers' calling preferences are

highly nuanced and cannot be adequately met by a crude regulatory regime based on the same binary logic as an on/off switch. Public comment in this proceeding demonstrates that consumers generally do not want to receive "all calls" or "no calls," but want to determine their own unique point somewhere along the spectrum. 46/ As various commenters recognize, some consumers may want to block most telemarketing calls, but continue to receive calls from charitable organizations and some businesses. *See, e.g.*, BellSouth at 4. By contrast, others may wish only to prevent calls from charities. The individuality of consumer preferences is well understood by the Red Cross, which views its own "do-not-call" program as "far superior" to the proposed national registry because it provides "over 30 different 'do-not-call' or call-limiting options to people who want to continue to be blood donors without being subjected to over recruitment." Red Cross at 4.

A national "do-not-call" registry would force consumers to make blanket predictive judgments about whether they will have interest in products, services, or causes that may not yet exist or about which they do not know. 47/ As commenters point out, many consumers simply do not know in advance from whom they do and do not want to receive telephone calls *until they receive a call.* 48/ According to Call Compliance, "the vast majority of consumers only dislike telephonic solicitations for products or services that they are not interested in at the time of the call." Call

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46/ *See, e.g.*, Red Cross at 4; Call Compliance at 6-7; Fund for Public Interest Research, Inc. at 1; March of Dimes at 2; Reese Brothers at 15 (discussing survey of consumers' telemarketing preferences).

47/ *See, e.g.*, ATT Wireless at 3; Call Compliance at 6-7; WorldCom at 6-7.

48/ *See, e.g.*, Call Compliance at 6-7; WorldCom at 6-7, 10.

Compliance at 7. WorldCom concurs and further explains that consumers' predictive judgments may often prove wrong: "Consumers cannot always anticipate all of the products, services or price reductions they may learn of via telephone solicitations, but when they are provided an offer that interests them, consumers respond favorably to, and benefit from, that telephonic solicitation." WorldCom at 6. This conclusion is corroborated by a recent survey, upon which the FTC relied, that found about one half of households surveyed acquired at least one product or service over the telephone during the past year. 49/

B. Creating a National Database Will Create a True Privacy Problem in an Effort to Prevent a Minor Annoyance

By equating simple annoyance with privacy, proponents of a national "do-not-call" database open the door to the creation of genuine privacy problems. As ATA explained in its initial comments, the interest addressed by the TCPA's "do-not-call" rules does not correspond to traditional notions of privacy embodied in the Fourth Amendment or recognized in tort law. ATA at 80-84. Rather, the law and its implementing rules focus on consumer "annoyance" and seek to give individuals a way to avoid "bothersome" telephone calls. With company-specific "do-not-call" lists, consumers are given a way to avoid such annoyance without giving up any privacy. 50/ But with a national database, the Commission would create a system that would have far-reaching effects on privacy.

49/ *Id.* at 6-7 (citing Michael A. Turner, Ph.D, Information Policy Institute, "Consumers, Citizens, Charity and Content: Attitudes Toward Teleservices," Final Report, p. 4-5, 17 (June 4, 2002)).

50/ The Commission's rules prohibit the sharing of names on company-specific "do-not-call" lists unless the company obtains the consumer's prior consent. 47. C.F.R. § 64.1200(e)(2)(iv).

A national "do-not-call" regime invites consumers to trade away some of their privacy to the government in exchange for greater protection from simple annoyances. Privacilla.org at 16 (national "do-not-call" program "encourages Americans to trade away a little privacy for a little peace and quiet"). As some observers have noted, "[t]he existence of a government databank *per se* increases the likelihood of privacy infringements." Richard Sobel, *The Demeaning of Identity and Personhood in National Identification Systems*, 15 Harv. J.L. & Tech. 319, 361 (Spring 2002). *See also* Privacilla.org at 15. Consumers are powerless to stop misuses of personal information held by the federal government because "governments have the power to change the terms under which information is held and used" with impunity. *Id.* at 8, 10, 16.

While such databases may be created with the best of intentions, the government's poor track record suggests this problem must be taken seriously. One scholar recounts:

> The privacy literature is liberally sprinkled with horror stories about inaccurate, incomplete, irrelevant, or derogatory information maintained in files; about personal information kept far longer than is necessary; about access by unauthorized people and organizations; about data in files of private and public bodies not authorized to receive them; about data being used out of context, for purposes other than those for which they were collected; and about deliberate intrusion and misuse of data files by unauthorized and authorized personnel. 51/

Well-documented examples of the government's use of citizens' personal information should give the Commission pause before it creates another massive database in the

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51/ Lillian R. Bevier, *Information About Individuals in the Hands of Government: Some Reflections on Mechanisms for Privacy Protection*, 4 WM. & MARY BILL RTS. J.

name of privacy. The White House's website collected personally identifiable information about children without obtaining verifiable parental consent in violation of federal privacy laws; 52/ government-run websites have disclosed personal information to third parties, including private entities; 53/ federal employees have accessed and disclosed personal information without authorization; 54/ federal agencies systematically exchange and merge personal information contained in government databases; 55/ some federal websites ignore privacy measures the FTC has recommended imposing

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455, 465 (Winter 1995) (quoting COLIN J. BENNETT, REGULATING PRIVACY: DATA PROTECTION AND PUBLIC POLICY IN EUROPE AND THE UNITED STATES 35-36 (1992)).

52/ *See Making the Rules, Breaking the Rules: How the "White House for Kids" Web Site Violates Federal Privacy Policy*, A Special Report Issued by Privacilla.org, at http://www.privacilla.org/releases/WhiteHouse-COPPA.pdf (Oct. 2002).

53/ GAO, *Internet Privacy: Agencies Efforts to Implement OMB's Privacy Policy* (Sept. 2000), at 14.

54/ A Social Security Administration employee recently "pled guilty to unauthorized access of the administration's systems." GAO, *Information Security: Serious and Widespread Weaknesses Persist at Federal Agencies* (Sept. 2000), at 2. According to the GAO, the "related investigation determined that the employee had made many unauthorized queries, including obtaining earnings information for members of the local business community." *Id.*

55/ *See Privacy and Federal Agencies: Government Exchange and Merger of Citizens' Personal Information is Systematic and Routine*, A Special Report Issued by Privacilla.org, at http://www.privacilla.org/releases/Government_Data_Merger.pdf (Mar. 2001) ("For the 18-month period from September 1999 to February 2001, federal agencies announced 47 times that they would exchange and merge personal information from databases about American citizens.").

on private sector sites; 56/ and the IRS has repeatedly and egregiously misused the highly-sensitive information in its possession. 57/

Such concerns are particularly relevant to this proceeding, given the involvement of state governments who are not well-known for their scrupulous use of their own databases. 58/ Various governmental agencies are already clamoring for broad access to the proposed federal "do-not-call" database. NAAG at 14-17; NARUC at 5; Texas PUC at 6. For example, the Texas PUC requests that state commissions have independent direct access to the national list for enforcement purposes, *see* Texas PUC at 6, while NAAG advocates continuous information sharing between federal and state regulators in both the creation and enforcement of the federal "do-not-call" registry. NAAG at 14-17. Here, the misuse of the Indiana "do-not-call" database by that state's attorney general to send an email to registrants in an effort to influence the outcome of this proceeding is but one example that should give the Commission some pause before it creates a national database. 59/ If state officials feel free to use

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56/ *See* GAO, *Internet Privacy: Comparison of Federal Agency Practices With FTC's Fair Information Principles* (Sept. 2000).

57/ *See, e.g.*, Sobel, *supra* pp. 23-24, at 361 ("In 1995, over 500 IRS agents were found checking the financial data of friends, relatives and celebrities"); Bevier, *supra* note 51, at 455, n.41; Robert D. Hershey, Jr., *Snooping by I.R.S. Employees Has Not Stopped, Report Finds*, N.Y. TIMES, Apr. 9, 1997, at A16 (internal report revealed that "IRS has made scant progress in cracking down on electronic snooping by its employees in confidential taxpayer files").

58/ *See*, *e.g.*, *Reno v. Condon*, 528 U.S. 141, 148 (2000) (detailing widespread practice by states of selling personal information collected by departments of motor vehicles).

59/ *See* ATA at 40-41 & Ex. 9 (spam email from Indiana Attorney General Stephen Carter to registrants of state "do-not-call" list).

such databases for whatever reason they see fit, there is little cause for optimism in how they will handle access to a national database.

C. A National "Do-Not-Call" Registry Will Harm the Economy

1. A National List Will Devastate the Teleservices Industry

The comments demonstrate that a national "do-not-call" registry will seriously harm the teleservices industry by restricting greatly an effective channel of communication. 60/ Many businesses will be unable to communicate with otherwise willing consumers because a blanket "do-not-call" requirement forces individuals to make an all-or-nothing choice. In this circumstance, consumers likely will opt out of all telemarketing calls, including those they otherwise might accept. 61/ The adverse impact of such restrictions can be significant. MBNA, for example, reports that its business from telemarketing has been reduced by 50 percent in states that have "do-not-call" lists. MBNA at 3. State do-not-call lists have proven equally disastrous for WorldCom's efforts to bring competitive service to telecommunications markets.

60/ *See, e.g.,* Direct Selling Association at 5 (national registry will impose "an onerous and potentially damaging restriction on the ability of small businesses … to use the telephone"); SBC at 6 (cost of compliance may be prohibitive "for all but the largest commercial entities"); National Association of Insurance & Financial Advisors ("NAIFA") at 4 (national "do-not-call" list would impose substantial burdens on small businesses); National Association of Mortgage Brokers at 1-3; National Retail Federation at 8-10 (practical effect for small businesses of national "do-not-call" regime "may be that they simply could not afford to contact customers they had served in the past"); Newspaper Association at 10-11, 13; Seattle Times at 2.

61/ *See, e.g.,* Call Compliance at 6-7 (national list "inevitably will attract large numbers of consumers who in fact would otherwise welcome timely telephonic solicitations"); Consumer Banking Ass'n at 6 ("[m]any consumers who would ordinarily purchase a product or service offered through telemarketing may never receive such calls since they would be forced to choose between either blocking all telemarketing calls or none"); WorldCom at 6, 10.

WorldCom at 10. As WorldCom explains, "MCI's local market penetration is up to 60% higher in the states without a state do-not-call list." *Id.*

Contrary to the claims of some commenters, telemarketers cannot effectively shift to other means of contacting potential customers. Many commenters make clear that telemarketing is the most cost-effective means for them to contact consumers. 62/ Ameriquest explains, for example, that it would be six times more expensive for it to "originat[e] loans through alternative advertising channels." Ameriquest at 1-2, 5. Telemarketing is a uniquely effective form of marketing, because it allows for invaluable two-way communications between a business and consumer. 63/ Nextel speaks for many telecommunications providers 64/ when it explains that "telemarketing allows sales representatives to tailor [the company's] diverse service and equipment offerings to the needs of the individual customer, answer customers' questions before they commit to a purchase, and resolve all details of a transaction with a single call." Nextel at 3. Furthermore, as MBNA points out, telemarketing is sometimes the only means by which some consumer goods or services can be successfully marketed. MBNA at 3. Specifically, MBNA notes that its "outbound

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62/ *See, e.g.*, Ameriquest Mortgage Co. ("Ameriquest") at 1-2, 5; Newspaper Association at 4, 15; Seattle Times at 1-2.

63/ *See, e.g.*, National Energy Marketers Ass'n at 5 (telemarketing is necessary to overcome consumer inertia); Nextel at 2-3 ("telemarketing offers prospective wireless customers certain advantages that cannot be duplicated efficiently through other marketing channels or media"); SBC at 7.

64/ *See, e.g.*, AT&T Wireless at 3 ("[t]elephone calls give companies valuable first-hand feedback . . . [and] create[ ] a two-way flow of information that is not always accomplished efficiently and effectively when done via other media"); SBC at 7 (consumers value and act on "information they receive from telemarketing solicitations"); WorldCom at 6, 12 (other forms of advertising are not as effective because they are "directed at the public in general"). *See also* MBNA at 5.

telemarketing group generated $4.3 billion in balance transfers from individuals who failed to respond to prior Direct Mail offers." 65/

Nor will a blanket preemptive "do-not-call" requirement help telemarketers by weeding out those who would prefer not to be called, as some commenters suggest. 66/ In this regard, the effect of a blanket national list is far different from that of the current company-specific approach. Teleservices firms can gain efficiencies from maintaining company-specific "do-not-call" lists because knowing that *specific* consumers are not interested in *specific* products, services, or charitable causes saves time and money that would otherwise be wasted contacting those particular consumers. *See, e.g.*, Verizon at 2. By contrast, businesses and other entities can divine very little about whether a particular consumer is interested in their products, services, or causes from that consumer's decision to opt in or out of all telemarketing calls, because of the global nature of the choice the consumer must make. 67/ A consumer may decide to accept all calls or no calls for a variety of reasons that have nothing to do with that consumer's view on specific organizations or specific products, services, or causes. *Id*. at 2. The all-or-nothing choice presented to consumers further impairs firms' abilities to glean useful information from consumers' opt-out decisions because such a choice

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65/ MBNA at 3. Such balance transfers enable consumers to save substantial amounts of money through reduced interest charges.

66/ *See*, *e.g.*, EPIC at 3-4 (asserting that a national "do-not-call" registry will be "lucrative" for telemarketers by enhancing their efficiency). *See also* Californians Against Telephone Solicitation at 2 ("number of calls would drastically diminish, [but] sales closing ratios would rise dramatically thus increasing profits[ ]"); NAAG at 21-22.

67/ *See* Household at 2 (current framework "allows telemarketers to maintain targeted calling lists with individual consumer preferences, an advantage that would be limited if an indiscriminate blanket do-not-call list [is] imposed").

requires consumers to make blind predictive decisions about products, services, and causes that may not yet exist or about which they do not know. 68/

Given these drawbacks, there is no merit to the FTC's suggestion that a national "do-not-call" registry could somehow "actually benefit rather than harm" the telemarketing industry. SBP at 142. A regulatory regime that confronts consumers with a blanket preemptive choice, rather than a more nuanced approach that better reflects individual preferences, is hardly a "benefit." There is likewise no benefit for companies that are forced to abandon cost-effective telemarketing and rely on more expensive (and less effective) methods of communicating. It is highly doubtful that the companies cited above, who have experienced a loss of business due to state "do-not-call" laws, will believe they have "benefited" when they experience the same treatment on a larger scale under a national "do-not-call" regime.

The FTC's explanation for how a national "do-not-call" regime might confer some kind of benefit is far-fetched. It suggests that a national registry will benefit industry by "provid[ing] greater consistency of coverage, at least with regard to interstate laws," SBP at 142, but there are several problems with this reasoning. "Greater consistency of coverage" means little more than that there will be that many more consumers whom telemarketers will be barred from reaching. In addition, any nod toward "consistency" must surely be accompanied by a wink, given that the FTC

68/ Contrary to EPIC's suggestion, *see* EPIC at 3-4, a national all-or-nothing "do-not-call" registry will thus have the perverse consequence of making businesses and other organizations less efficient, because they will have to find more costly means of contacting consumers and learning which consumers have interest in which products, services, or causes. *See, e.g.,* Nextel at 2-3 ("telemarketing allows sales representatives to tailor Nextel's diverse services and equipment offerings to the needs of the individual customer").

failed to ensure its new registry would not simply be another layer of regulation on top of existing state laws (though it did acknowledge that industry support for a national registry was premised on the preemption of such laws). *See* SBP at 142, 158-59. The FTC also admits that any potential benefit would be limited in any event, as it applies only "with regard to interstate calls," while the FTC declined to do anything more than "work with" the states in hopes of mitigating the burden of overlapping regimes. *See id*. at 142, 158. All told, FCC adoption of a national "do-not-call" regime will only harm, not benefit, telemarketers.

2. A National "Do-Not-Call" Database Would Undermine Communications Policy Goals

The comments reinforce ATA's position that a national "do-not-call" database would undermine the fundamental communications policy goal of fostering greater competition in the telecommunications industry. As an initial matter, telecommunications providers have been quick to stress the singularly bad timing of the Commission's proposal. *See, e.g.*, BellSouth at 2; Sprint at 11; WorldCom at 9-10. The Commission seeks to introduce onerous and anti-competitive regulations during tumultuous times in the communications sector: Competition is burgeoning, but financial problems have also rocked the entire industry. BellSouth at 2; WorldCom at 9-10.

The record confirms that telemarketing plays a vital role in promoting competition in the telecommunications sector. 69/ Telemarketing allows telecommunications providers a cost-effective means to offer consumers custom telecommunica-

69/ *See, e.g.*, AT&T Wireless at 3 (telemarketing is an effective tool for informing consumers of new services, price offerings, and products); Nextel at 2 (telemarketing has played an important role in company's growth); WorldCom at 4; Verizon at 3

tions service packages, inform consumers of new products or services, and advertise price discounts and other price-related benefits. 70/ Therefore, it should not be surprising that "telephone solicitations are the primary mechanism for, and the means by which consumers are accustomed to, purchasing competitive telecommunications service." *See* WorldCom at 7. In fact, according to a recent study, telephone service is the second-most commonly acquired product or service purchased over the phone. 71/

A national "do-not-call" registry would significantly undermine these salutary efforts. *See, e.g.*, WorldCom at 10. The comments confirm that a national "do-not-call" registry will negatively affect price competition, leading ineluctably to higher prices, by insulating firms from raids on their customers by rival firms. WorldCom at 12-13. Furthermore, WorldCom's experience with existing state "do-not-call" lists foreshadows the negative effects a national list will have on further opening to competition telecommunications markets historically dominated by monopolies. *Id*. at 10. WorldCom reports that nearly all of its subscribers have been secured through its telemarketing efforts and that its penetration into once monopolized local markets has been 60 percent higher in states without "do-not-call" registries. *Id.* at 14.

A national "do-not-call" registry would thus have the unintended and anti-competitive consequence of putting the Commission in the business of picking winners

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(Verizon telemarkets to consumers in all 50 states and the District of Columbia); Verizon Wireless at 8.

70/ *See, e.g.*, AT&T Wireless at 3; Nextel at 2-3; WorldCom at 12.

71/ *Id.* at 7 (citing Michael A. Turner, Ph.D, Information Policy Institute, "Consumers, Citizens, Charity and Content: Attitudes Toward Teleservices," Final Report, p. 3 (June 4, 2002)). The most commonly acquired good or service is magazine and newspaper subscriptions, with telephone service a close second.

and losers in the telecommunications marketplace. WorldCom at 13-16. A national "do-not-call" registry coupled with an exemption for calls to existing customers will discriminate against new entrants in the telecommunications industry by immunizing incumbent service providers, who still hold the lion's share of the market, from the effects of a national registry. *Id*. at 14. Incumbent local exchange carriers, who still hold 90 percent of the local customer base, "would be virtually exempt from the effects of a [national 'do-not-call' list] within their incumbent region. As a result, the [national 'do-not-call' list] would have virtually no impact on the ILECs' ability to telemarket new services, such as long distance services, in-region." *Id.* Thus, by virtue of the exemption for established business relationships, "incumbents will have more flexibility in their marketing campaigns, in particular the ability to use the most cost-effective and personal marketing tool for competitive telecommunications sales, while new entrants will be force[d] to use more costly and less effective mechanisms." *Id.* Therefore, the proposed registry will work to subvert the Commission's well-established pro-competitive telecommunications policy.

D. A National "Do-Not-Call" List Will be Costly and Difficult to Maintain

The record developed in this proceeding shows that establishing and maintaining in reasonably accurate form a national "do-not-call" registry promises to be a costly and difficult endeavor. 72/ The few comments with an optimistic view on this

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72/ TCPA Order ¶ 14. *See also, e.g.,* Mortgage Bankers Ass'n at 2 ("the same concerns that existed in 1992 exist today"); National Association of Independent Insurers at 2 ("[c]reation of a national registry would be costly and maintenance of the list in a timely and reasonably accurate manner will be difficult"); National Energy Marketers Ass'n at 3-4; Qwest at 7 (no basis for Commission to revisit prior decision); SBC at 4-8; Verizon at 8.

issue only claim that barriers to implementing a national "do-not-call" list have been lowered, not entirely eliminated. 73/ On the other hand, Sprint notes that the "establishment and maintenance of a new national database is likely to be far more complicated today than envisioned ten years ago." Sprint at 11. However, even the rosy assessments must be leavened by the awareness that the FTC's estimate of the cost of maintaining a national "do-not-call" registry mushroomed from $3-5 million to $16 million. 74/

The comments filed in this proceeding confirm the difficulty of keeping a national "do-not-call" registry reasonably accurate. 75/ The rate at which telephone numbers change hands, 76/ the increased number of service providers, 77/ and the multitude of state "do-not-call" regulations, 78/ will all prove serious challenges to maintaining the integrity of a national list. Additionally, even one of the optimistic commenters, LSSi Corporation, acknowledges that carrier switching will increase the

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73/ *See, e.g.*, VeriSign, Inc. at 4, 9 (proposing that carriers implement network solutions, while Verisign, working with a third-party administrator, maintains a national database); NCS Pearson, Inc. at 2, 4, 6 (noting that computing power has increased, that similar databases have been successfully deployed, and that costs should be less than initial estimates); LSSi Corp. at 6 (stating telephone subscribers will need to re-register when they change telephone numbers or carriers).

74/ *Compare* 67 Fed. Reg. 37,363 (May 29, 2002)*, with* Press Release, FTC, *FTC Chairman Briefs House Committee on Energy and Commerce about the Telemarketing Sales Rule's "Do Not Call" Amendments*, Jan. 8, 2003.

75/ *See* SBC at 6 ("[e]stablishing and maintaining a database of that size and ensuring its accuracy would be an enormous undertaking"); Sprint at 11; WorldCom at 17 ("Commission's concerns about accuracy have not been resolved").

76/ *See, e.g.*, Sprint Corp. at 11; Nextel at 6; Qwest at 4-5; WorldCom at 17.

77/ *See, e.g.*, Sprint at 11.

78/ *See, e.g.*, AT&T Wireless at 8-9; Qwest at 8; Verizon at 8.

burden of maintaining the accuracy of the national registry, because "no mechanism currently exists to track the movement of a subscriber between carriers." LSSi Corp. at 6. Consumers thus will be required to re-register on the national "do-not-call" list not only when they change telephone numbers, but when they change carriers as well. 79/ Importantly, these concerns cannot be simply ignored or downplayed, because inaccuracies in a national "do-not-call" list will materially hinder efforts of businesses and other entities to engage in protected speech. *See* WorldCom at 17 ("The importance of accuracy in maintaining the list cannot be underestimated since inaccurate data potentially denies information to persons who did not elect to be place [*sic*] on the list."). Thus the Commission's past conclusion regarding the substantial effort required to establish and maintain an accurate "do-not-call" registry remains true today.

Likewise, if the Commission decides to create a national "do-not-call" list, it will come at a high price. The cost of a national registry, as some commenters point out, may be less than the Commission's early estimates in 1992 because of technological advances in data management. *See* NCS Pearson at 6; LSSi Corp. at 5. Nevertheless, such a regime will still be expensive, as demonstrated by the fact that the FTC's assessment of the cost more than quadrupled during the course of its rulemaking. 80/ In recent testimony before Congress, the Chairman of the FTC estimated that that agency's national "do-not-call" program will cost $16 million, though

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79/ LSSi Corp. at 6.

80/ *See* BellSouth at 3 (a national registry may create the need for a sizable organization that will incur significant annual costs); Sprint at 11, 18 (no reason to believe that costs will be lower than initial estimates); WorldCom at 5, 17.

it initially placed the cost at $3-5 million. 81/ The difficulty and expense of this endeavor also is demonstrated by the experiences of those who have implemented, or are currently implementing, similar registries. 82/ Furthermore, the comments claiming that concerns about the costs of implementing a national registry are no longer substantial, in reality, just propose transferring the hidden costs of implementing the proposed registry onto telecommunications providers. 83/ Additionally, the costs for businesses to comply with the proposed FCC "do-not-call" regime may simply preclude many from engaging in telemarketing. 84/ Therefore, many of the concerns that persuaded the Commission to reject a national "do-not-call" database in 1992 still apply, and should motivate the Commission again to reject implementing such a regime.

E. There is No Way to Reconcile a National Do-Not-Call List, or Support in the Comments for Such a List, with State Laws and FCC Authority Under the TCPA

The comments support ATA's position that adopting a national "do-not-call" database, on top of the disparate state laws telemarketers already face, would

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81/ Press Release, *FTC Chairman Briefs House Committee on Energy and Commerce about the Telemarketing Sales Rule's "Do Not Call" Amendments,* at http://www.ftc.gov/opa/2003/01/tsrhousebrief.htm (Jan. 8, 2003).

82/ *See* WorldCom at 17-18 ("'states that have established No Call database systems have done so at considerable expense'") (quoting NAAG comments to FTC).

83/ *See* LSSi Corp. at 14 (proposing to impose obligation to track carrier switches on carriers); VeriSign at 9 (proposing carriers implement network solution).

84/ *See, e.g.,* Direct Selling Ass'n at 5 (national registry will impose "an onerous and potentially damaging restriction on the ability of small businesses … to use the telephone"); SBC at 6 (cost of compliance may be prohibitive "for all but the largest commercial entities"); NAIFA at 4 (national "do-not-call" list would impose substantial burdens on small businesses); National Ass'n of Mortgage Brokers at 1-3; National Retail Fed'n at 8-10 (practical effect for small businesses of national "do-not-call" regime "may be that they simply [will be unable to] afford to contact customers they had served in the past"); Newspaper Association at 10-11, 13; Seattle Times at 2.

unnecessarily burden teleservices in exchange for relatively little consumer benefit, and would be unworkable under the TCPA. ATA at 51-52. Most of the commenters favoring a national "do-not-call" list (apart from the states) expressly condition their support on preemption of state laws. In particular, a national "do-not-call" regime that does not supplant state law is opposed by virtually all telecommunications service providers because it would undermine competition.

The record lacks broad support for any national "do-not-call" rule that does not also preempt existing state lists and requirements. For example, March of Dimes, which conducts "significant . . . fundraising" through "outside telemarketing firms," expressed "deep[ ] concern about possible amendments to the TCPA regulations," noting that any "national 'do-not-call' registry maintained by the federal government should preempt state lists." 85/ Every industry represented in this proceeding shares the perspective voiced by the March of Dimes. This includes teleservices representatives other than ATA, 86/ banks and financial service providers, 87/ insurance providers, 88/ retailers, 89/ and communications service

85/ March of Dimes at 1-3. *See also* Colorado PUC at 5 ("While a 'one-size-fits-all' approach . . . may be expedient, it may not be good public policy.").

86/ *See* DMA at 40-41 ("Congress . . . expected and intended the Commission to preempt other requirements to ensure that marketers would only have to obtain one list.").

87/ *See* Bank of America at 7 ("the FCC should revisit . . . a national list, but only if it can preempt state do-not-call lists"); MasterCard International, Inc. ("MasterCard") at 4-5 ("preemption is essential" under any FCC do-not-call registry); American Express at 2; Consumer Bankers Ass'n at 6; American Bankers Ass'n at 5-6.

88/ *See* Farmers Insurance Group at 3 ("a national do-not-call list . . . would . . . eliminate the need for separate state legislation").

providers. 90/ In addition, every telecommunications service provider that "supports" a national list does so under the same conditions and reservations as the commenters above, and some flatly reject the notion of a national "do-not-call" list. 91/

Since virtually all support for adoption of a national "do-not-call" list is conditioned on preemption of all state do-not-call rules, Qwest hits the nail on the head in its observation that "unless the Commission is willing *and able* to preempt state DNC initiatives and related requirements," a national list would be problematic in that "legal authority to preempt state TCPA-type initiatives is not clear." Qwest at 9 & n.21 (emphasis added). *See* Bank of America at 7 ("the FCC should revisit . . . a national list, but *only if it can preempt* state do-not-call lists") (emphasis added). But it is far from obvious what the FCC is "able" to do to satisfy the threshold requirement virtually every commenter places on its support of a national "do-not-call" list. The TCPA precludes

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89/ *See* National Retail Fed'n at 10 (listing "reasonable [do-not-call] system coupled with some form of preemption" as an "essential requirement"); Electronic Retailing Ass'n at 11-14 ("[a]ny national DNC list should preempt or be harmonized with state DNC lists").

90/ DirecTV, Inc. at 3 (favoring "single, pre-emptive [FCC] national database").

91/ *See* BellSouth at 3 ("The Commission should not implement a national do-not-call list."). *Accord* Sprint at 10; WorldCom at 3-18; Qwest at 7-9; SBC at 5-7. Even carriers that might welcome a national "do-not-call" regime do so with reservation. For example, noting that the "industry has reached the point where there is too much of a good thing," Verizon favors retention of company-specific "do-not-call" lists and supports a national list only based on a belief that such an approach "requires preemption of separate state lists." Verizon at 3-6, 8. *Accord* AT&T Wireless at 13-17 ("national do-not-call list makes state . . . lists unnecessary and duplicative"); Nextel at 4-6. As a result, most telecommunications commenters effectively favor retention of the existing rules, arguing that "[t]he Commission should not adopt any additional telemarketing restrictions." Verizon Wireless at 13. *Accord* WorldCom at 37-40 ("Commission should retain . . . its current TCPA rules"); SBC at 4; Verizon at 3-6. *Cf.* Qwest at 9-10 ("Commission should proceed with a *Further Notice* once it has a clearer vision regarding specific rule changes").

the Commission from preempting state laws that impose "more restrictive" requirements than what the FCC requires. 47 U.S.C. § 227(e)(1). While the statute does not specify what it means for a state law to be "more restrictive" than federal rules, the numerous "moving parts" in the various sets of rules leave no immediately apparent way to reconcile state requirements and the proposal under Commission consideration, which has received only conditional support. 92/

Meanwhile, though commenters from all parts of the industry support a national "do-not-call" list only if it supplants state laws, support from the state attorneys general and public utility and consumer protection agencies favor the proposal only if it does not preempt state regimes. For example, any support NAAG throws behind the national "do-not-call" approach is conditioned on the "concern" that it "not supplant . . . state laws." NAAG at 8. NYCPB offers "strong support" of a national do-not-call list created by the FCC as a "welcome addition," but it is "not prepared at the present time to commit to any specific proposal absent . . . staffing at *both* the federal and state levels." NYCPB *Do-Not-Call* at 2, 20 (emphasis added). The Colorado PUC goes one step further, voicing concern that "a federal no-call program may pre-empt and negate effective and successful state-based no-call programs," and therefore states that the PUC "believe[s] a national no-call program is . . . unwarranted." Colorado PUC at 3.

The difficulty with this impasse is that no party has offered any clear way to reconcile the FCC's exercise of authority, if it were to adopt a national "do-not-call"

92/ *See* ATA at 48-50 & Exhibit 13 (state law chart).

list, with state authority and laws. 93/ The comments from the state commenters all either staunchly guard against incursion onto state authority, fail to meaningfully explore how the federal and state regimes should be reconciled, or both. For example, the Colorado PUC has no answers for reconciling federal and state initiatives. Instead, it concludes its comments with a list of imponderables that simply drops the issue back in the FCC's lap. 94/ Similarly, the Texas PUC's "solution" for how to reconcile federal and state mandates is to propose yet more bureaucracy, an FCC/FTC/state "working group," to "work cooperatively" to somehow get at the issue. Texas PUC at 5-6.

The Tennessee Regulatory Authority and that state's Attorney General fare little better in trying to make sense of the prospect of overlapping federal and state rules. They encourage the FCC to take "great care" to "not effect [*sic*] the viability of state programs, and to "insure [*sic*] cooperation and comity between the states and the federal government in this area." TRA/TAG at 3-5. But in the end they are left throwing proposals to preserve state authority up against the wall to see what sticks, including simply allowing states to not participate in the FCC regime, or making the federal rule merely some kind of "minimum regulation standard nationwide." *Id*. at 4, 9-10. Thus, while Tennessee lauds what it calls "a golden opportunity for collaborative and complementary state and federal regulation," *id*. at 5, it offers no plan for capitalizing on it.

93/ ATA acknowledges that DMA has endeavored to craft a "sum of the states" proposal addressing existing state "do-not-call" regimes and a possible new national database. DMA at 46-52. This proposal, however, is premised on FCC adoption of a national "do-not-call" database, which DMA, like virtually every other commenter, supports only if it preempts all state "do-not-call" lists. *See id*. at 40-41.

94/ *Id*. at 5-6. *See also* NYCPB *Do-Not-Call* at 15-16 (noting "clearly overlapping jurisdiction," "practical administrative challenges" and need for "federal-state . . .

Instead, the state seems more interested in maintaining the revenue it receives from operating its own "do-not-call" list than it does in offering meaningful suggestions on reconciling federal and state initiatives. *See*, *e.g.*, *id*. at 7 ("funding for . . . the registry maintained in Tennessee would be reduced since telemarketers would register only at the federal level . . . result[ing] in the loss of [ ] primary funding"). Similarly, PUCO offers little more than the admonition that "the FCC, the FTC and the states will need to gear up for an aggressive enforcement plan from the beginning." PUCO at 9. Yet it stops well short of truly exploring the contours of what should be enforced, or how.

Perhaps most revealing is NAAG's Rube Goldberg approach, under which an FCC "do-not-call" regime would simply be laid on top of the FTC's rules and state laws with the hope that they somehow all work together of their own accord. NAAG at 4-5. NAAG not only opposes preemption of existing state laws – including, presumably, those less restrictive than a possible federal rule – it also contemplates future state laws that will be added on top of whatever the FCC does here. *Id*. at 4. *Cf.* North Dakota PSC (supports national "do-not-call" list that "does not preempt state activity," noting that "North Dakota does not currently have a do not call law although the [North Dakota PSC] is considering proposing [one]"). Under this purported system, "[i]t would not even be necessary for the consumer to determine which laws were implicated," NAAG at 5, but rather the FCC, FTC and relevant state attorney general would all somehow put their heads together and figure out how to proceed. *Id*. The NAAG makes a number of assertions that such cooperation is not "novel" or "peculiar," but it

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protocols," but questioning how joint federal-state enforcement would work, suggesting "it may be premature to deal with such questions at this stage").

offers precious little instruction (other than imploring the FCC, FTC and states to combine their lists and share information) on how this will work to balance legitimate telemarketing efforts and First Amendment protections against consumer interests. *Id*. at 16-21. *See also* NARUC at 2-4 (arguing, without legal analysis, that "dual lists enhances [*sic*] deterrence and leverages the enforcement staff of the FTC and the states"); National Association of Consumer Agency Administrators at 4 (declining to offer "detail suggestions" [*sic*] in favor of arguing that a "comprehensive do-not-call system . . . *might be* the best cure") (emphasis added). Until the FCC can answer these difficult questions, it runs the risk of any national "do-not-call" list it adopts spawning only regulatory uncertainty, consumer confusion and significant burdens on industry and the economy.

III. A NATIONAL "DO-NOT-CALL" LIST WOULD VIOLATE THE FIRST AMENDMENT

As the Commission acknowledged in the NPRM, an assessment of the constitutional implications of any amendment to the TCPA rules is required for it to carry out the balancing process prescribed in the Act. *See* NPRM ¶¶ 12, 50. In response to the initial request for comments, ATA provided a comprehensive analysis of the First Amendment issues, and explained why a blanket preemptive "do-not-call" requirement would violate the Constitution. ATA 58-91. Advocates of a national "do-not-call" registry, on the other hand, have attempted to support their conclusion that such a rule would be consistent with the First Amendment, primarily by reasoning that it would satisfy the test for regulating commercial speech set forth in *Central Hudson Gas*

& Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980). 95/ However, for reasons ATA has already set forth in detail, *Central Hudson* is not the appropriate First Amendment test where, as here, the purpose of the rules has nothing to do with commercial transactions *per se*. ATA at 64-79. Even if the *Central Hudson* standard for regulating commercial speech should be applied in this proceeding, a national "do-not-call" requirement would not survive constitutional scrutiny. *Id*. at 80-90.

The heart of the argument by those who support a national registry – including the FTC – is that any regulation of telemarketing in the name of residential privacy is constitutional because it is merely effectuating individual homeowners' preferences to avoid contact. They cite the Supreme Court's decision in *Rowan v. Post Office Dept*., 397 U.S. 728, 731 (1970), which upheld a postal regulation that permitted homeowners to block "unsolicited advertisements that recipients found to be offensive because of their lewd and salacious character." Proponents of a national registry argue that the current company-specific "do-not-call" approach is inadequate because it requires consumers to actually "talk" to telemarketers, City of Chicago at 4, and to inform "each and every telemarketing company of his or her desire not to receive telephone calls." NAAG at 29. *See also* SBP at 135 (company-specific requests are too burdensome because consumers must repeat their "do-not-call" requests to every telemarketer). And, invoking *Rowan*, they conclude that a national "do-not-call" registry would be more efficient because it would preemptively block calls without the need to express a preference to individual telemarketers. *Id*. *See also* SBP at 151-152.

95/ *See*, *e.g*., NAAG at 26-30; EPIC at 5-9.

But this position, espoused by commenters in this proceeding and embraced by the FTC in its decision to amend the TSR, represents a profound misunderstanding of the law. It assumes that blocking more speech in advance is a measure of a "do-not-call" program's success, and that seeking a statement of intent to bar calls from a particular solicitor is only a bothersome technicality. However, the proponents of a national registry seek to dispose with the one essential element that made the postal regulation in *Rowan* constitutional – individual choice about which calls should be blocked. 96/ Here, the proponents of a national "do-not-call" solution even acknowledge that their preferred policy poorly approximates the actual desires of consumers. As a result, the blanket preemptive approach is significantly over- and underinclusive, and is therefore invalid under the most basic First Amendment principles. 97/

A. The First Amendment Does Not Permit Sacrificing Speech for Efficiency

The FTC and other advocates of a national registry claim that its principal virtue is precisely the reason courts usually strike down government restrictions – it prohibits more speech, rather than less. The reliance on *Rowan* is intended to paper

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96/ Under the law at issue an addressee could submit a written request that the Postmaster General issue an order blocking further unsolicited mailings from a specified sender. The sender would also be required to delete the addressee's name from his mailing list. *Rowan*, 397 U.S. at 730.

97/ *Playboy Entm't Group*, 529 U.S. at 817 ("The line between speech unconditionally guaranteed and speech which may legitimately may be regulated, suppressed or punished is finely drawn. Error in marking that line exacts an extra-ordinary cost.") (internal quotation marks and citation omitted). *Cf. American Library Ass'n v. United States*, 201 F. Supp.2d 401, 479 (E.D. Pa. 2002) (three-judge district court) ("Where the government draws content-based restrictions on speech in order to advance a compelling government interest, the First Amendment demands the precision of a scalpel, not a sledgehammer.").

over this anomaly on the theory that no one has a right to transmit speech contrary to the expressed intent of the recipient. NAAG at 6 ("[n]o marketer has an inalienable right under the First Amendment . . . to intrude when uninvited"). But the major flaw with this analysis is that it utterly misreads *Rowan*, which required *precisely* the kind of individualized showing that the proponents of a national registry describe as "burdensome." In fact, the law upheld in *Rowan* operates almost exactly like the company-specific "do-not-call" requirements, and has almost nothing in common with the proposals for a national registry, in which the government establishes favored and disfavored categories of calls to be blocked.

There is no question but that a national "do-not-call" list will prohibit more speech than will the company-specific lists. Its principal appeal is that it will impose a more indiscriminate restriction on speech than does the company-specific requirement. But the Supreme Court has affirmed "simply and emphatically that the First Amendment does not permit the [government] to sacrifice speech for efficiency." *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 795 (1988). In particular, the government cannot claim that it is addressing the "privacy" problem by asserting it will reduce the total number of solicitations where it employs regulations that are not based on individual privacy preferences. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 638-639 (1980). "'Broad prophylactic rules in the area of free expression are suspect.'" *Id*. (citations omitted). Here, by proposing to divorce the types (and number) of calls that will be blocked from individual "do-not-call" requests, the Commission commits two significant errors: It will block more calls than does the

company-specific approach, and it bases the decision on which calls to block on categories chosen by the government, not the individual.

The Supreme Court in *Rowan* made quite clear that the law in that case was constitutional *only* to the extent the blocking order effectuated individualized preferences. *Rowan*, 397 U.S. at 737 (individual must submit request to block unsolicited material and government officials have no power "to make any discretionary evaluation of the material"). *See Martin v. City of Struthers*, 319 U.S. 141, 144-145 (1943) (government cannot "substitute[ ] the judgment of the community for the judgment of the individual householder" in blocking unsolicited communications). More "efficient" rules that were intended to serve the same interest – *e.g.*, to block unsolicited mailings but which allowed the government to define the restricted categories – have been invalidated. *Bolger v. Youngs Drug Prod. Corp.*, 463 U.S. 60, 69 n.18 (1983). In this regard, the Commission has acknowledged that the constitutionality of "do-not-call" requirements are governed by this analysis of *Rowan*. *Unsolicited Telephone Calls*, 77 F.C.C.2d at 1035 ("the Court made clear its reliance upon the fact that it was the householder and not the postmaster who determined what mail was provocative and should not be sent"). The Supreme Court has made clear that a regulation designed simply to reduce the total number of calls that is not based on the individual privacy interests of persons cannot survive First Amendment scrutiny. *Schaumburg*, 444 U.S. at 638-639.

B The Record Demonstrates the Over- and Underinclusiveness of a National "Do-Not-Call" Registry

The record confirms the Commission's 1992 findings that a national "do-not-call" registry will not serve the needs of individuals who "would like to maintain their

ability to choose among those telemarketers from whom they do and do not wish to hear," *TCPA Report & Order*, 7 FCC Rcd. at 8761. And it reaffirms the finding that a national registry would not satisfy those who would like to block every call, due to the various exemptions and exclusions. *Id*. at 8758-59. Strangely, and despite its adoption of a national registry requirement in the Amended TSR, the FTC also found that "consumers preferred a 'nuanced approach' to the 'do-not-call' issue, wanting to limit some calls to their household, but not all calls." SBP at 37 (citing findings of Information Policy Institute Study). Yet it adopted rules that emphatically avoided "nuance" and that made no attempt to match consumer preferences. 98/ Any such national registry, whether administered by the FCC or the FTC, would necessarily be both over- and underinclusive.

The record in this proceeding, as well as the FTC's findings, demonstrates vividly that the "all-or-nothing" choice presented by a national registry will cause significant over-blocking of calls that consumers otherwise would permit. The FTC illustrated this point in its decision to subject charitable solicitations only to company-specific "do-not-call" requirements, and not to the rigors of the national registry. It stated:

98/ The Information Policy Institute Study cited by the FTC found that 50 percent of consumers supported regulations that would allow local or community-based organizations to call during specified times, slightly less that half would permit calls from local or community-based organizations with which they have an existing relationship, and that 40 percent would permit calls from national organizations with which they have an existing relationship. SBP at 37. The study shows that individuals' preferences are highly varied and it also highlights the difficulty of making a judgment about which calls should be restricted and which calls exempted under a national registry requirement. And, as it turned out, the FTC paid no attention to these various preferences in its Amended TSR.

> The Commission is concerned that subjecting charitable solicitation telemarketing – along with commercial telemarketing to solicit sales of goods and services – to national "do-not-call" registry requirements may sweep too broadly, because it could, for example, prompt some consumers to accept the blocking of charitable solicitation calls that they would not mind receiving, as an undesired but unavoidable side-effect resulting from signing up for the registry to stop sales solicitation calls. 99/

The FTC's concern in this regard is well founded, although its assumption that it need only concern itself with the constitutional impact on non-profit organizations is wrong. The record in this proceeding shows that the same is true for commercial calls where consumers are forced to make an all-or-nothing choice. In fact, the comments of DialAmerica give an indication of the magnitude of the problem. Based on its analysis of the past five years, and an overall "do-not-call" list that contained 17.2 million names, it found that approximately 41 percent of the households on the list wanted to receive calls from some commercial entities even though they preferred to be blocked for others. 100/

In addition to significant overblocking, the national "do-not-call" registry will result in substantial underblocking, at least in the minds of those who believe all telemarketing calls should be banned. The Commission made clear at the outset of this

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99/ SBP at 154. The FTC noted that the burden on non-profit entities that use paid solicitors was "significantly reduced" by its decision to require adherence only to company-specific "do-not-call" requirements and not the national registry. *Id*. at 232. Of course, this means that the burden on those covered by the national "do-not-call requirement is "substantially increased."

100/ Because it manages "do-not-call" lists for various companies, DialAmerica was able to make a comparative analysis of commercial "do-not-call" requests. Out of a total database of 17.2 million numbers, it found that calls were made to 7.1 million numbers where no "do-not-call" request was made, even though the same consumers had made "do-not-call" requests from other companies. DialAmerica at 6.

proceeding a national "do-not-call" requirement will not affect calls from political, charitable, or religious organizations, nor will it cover non-commercial calls such as surveys or polling calls. NPRM ¶¶ 30, 31, 33. The rules also would apply differently to certain commercial callers, depending on their relationship with the consumer. However, the record shows that there is no difference to the consumer, in terms of the impact on privacy, between exempt and non-exempt calls. 101/ Indeed, a large number of commenters urged the Commission to establish a registry that would block all calls, even those placed by political, religious, or charitable organizations. 102/ The FTC likewise observed that "consumers are disturbed by unwanted calls regardless of whether the caller is seeking to make a sale or to ask for a charitable contribution." SBP at 155.

The FTC further confirmed the problem of underblocking when it decided to require charitable solicitors that use professional call centers to adhere to company-specific "do-not-call" requirements. 103/ It concluded that the company-specific

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101/ See ATA at 67-75 & Ex. 12. Actually, survey data submitted by ATA does show one notable difference – the type of telemarketing calls considered least acceptable by most consumers come from political organizations. *Id*. at 74.

102/ *See*, *e.g*., Private Citizen at 4-5 (all unsolicited calls, whether designated as a "teleservice call, survey call, courtesy call, fundraising call, care call, political call, appreciation call, or a leafy green vegetable call, is a telemarketing call in the eye of the called resident"); Charles Baldwin at 1 (supporting "total ban" on all unsolicited telemarketing calls); Wayne Bethards at 1 (supporting prohibition on telemarketing "with no exemptions"); Biggerstaff at 7 ("exemptions are unwarranted. When someone says they don't want telemarketing calls, they mean it."); Dennis Hennen at 1; Judy Ivey at 1; Diana Mey at 1; Bob Scherer at 1; Paul Woods at 1; Samuel Whitley at 8-9; Michael Worsham at 14.

103/ However, the FTC's reasoning was constitutionally flawed for other reasons. Its rule still excludes other categories of calls, including those made by political or religious organizations, not to mention any other non-commercial entities. Moreover, its decision to apply its rule only to charities that employ for-profit call centers flies in the face of

approach is constitutional because there is a "direct correlation between the governmental interest and the regulatory means employed to advance that interest: The consumer requests a specific caller not to call again, and the regulation requires the caller to make a record of and honor that request in the future." SBP at 154 But it found that a national registry was not narrowly tailored (at least when applied to charities), because it would not accurately implement consumer preferences. 104/ The FTC's treatment of this issue is highly significant in that it admits that its new national registry fails traditional First Amendment scrutiny.

The FTC's only defense to its own constitutional reasoning is the claim that the government has greater latitude to restrict commercial telemarketing calls than it does charitable calls. *See* SBC at 153-154. Or, as FTC Chairman Muris put it when he announced the Amended TSR, in an apparently unintentional paraphrase of George Orwell, "charities and religions have First Amendment rights that others don't have." 105/ This sentiment, which is also reflected in the comments filed in this proceeding, is plainly incorrect, since all parties admit that the commercial/non-commercial distinction is wholly irrelevant to the privacy interests the government is

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well-established precedent. *Riley*, 487 U.S. at 794 n.8; *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 955 n.6 (1984); *Schaumburg*, 444 U.S. at 631-633. The Supreme Court consistently strikes down regulations that fall more heavily on charities that use professional call centers as opposed to those that make calls themselves. *Riley*, 487 U.S. at 799-800.

104/ The FTC agreed with non-profit organizations who opposed a national registry, finding that it would be "too costly . . . to obtain prospective donors' express permission to call, and too difficult for consumers to exercise their right to hear from them." Consequently, it concluded that a national list was not narrowly tailored. SBP at 154.

105/ Remarks of Chairman Timothy J. Muris, FTC Press Conference, Dec. 18, 2002. *Compare*, George Orwell, ANIMAL FARM 123 (1946) ("some animals are more equal than others").

trying to serve through its "do-not-call" regime. *See generally* ATA at 67-80. The rationale for applying a more forgiving First Amendment standard to commercial speech restrictions loses its force where, as here, the limitation on communication "bears no relationship *whatsoever*" to any purported difference between commercial versus noncommercial telemarketing calls. 106/ Since there is no essential nexus between the commercial nature of the telemarketing calls and the government's privacy concerns, the distinction is unconstitutional. 107/

C A National "Do-Not-Call" Registry Does Not Appropriately Balance Constitutional Values

Contrary to the assumptions of the FTC and various commenters in this proceeding, the Commission's constitutional and statutory obligation to "balance" First Amendment rights cannot be met by favoring the speech of some telemarketers (*e.g.*,

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106/ *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 424 (1993) (emphasis in original). Dictum in *Watchtower Bible* suggesting that the permit requirement at issue there might have been adequately tailored if it applied only to commercial activities and the solicitation of funds is not to the contrary. *See Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 122 S. Ct. 2080, 2088 (2002). That case involved a registration requirement for speech activities, not a direct prohibition on speech as is imposed by a national "do-not-call" registry. In any event, the persuasive value of such dictum is negligible where the Supreme Court has not yet had an opportunity to rule on a particular legal question. *Compare Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 717, 756 (1996) (speculating that Section 505 of Telecommunications Act might be a constitutionally acceptable means of regulating speech), *with Playboy Entm't Group, Inc*., 529 U.S. 803 (holding that Section 505 is unconstitutional).

107/ In *Schaumburg*, the Supreme Court struck down an ordinance that restricted how much money a charity could devote to administrative costs, reasoning that there was no connection between the asserted privacy interests and the percentage limit. 444 U.S. at 638-639 ("[H]ouseholders are equally disturbed by solicitation on behalf of organizations satisfying the 75-percent requirement as they are by solicitation on behalf of other organizations. The 75-percent requirement protects privacy only by reducing the total number of solicitors, as would any prohibition on solicitation.") Here, there is no connection between the asserted privacy interests and the commercial/non-commercial distinction.

charitable, political or religious organizations) while limiting the rights of others (*e.g.*, most commercial callers). It ignores entirely that the First Amendment "includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience." *Hill v. Colorado*, 530 U.S. 703, 716 (2000). Here, the only "balance" taking place is the government's decision that some commercial and non-commercial speakers are permitted to make unsolicited calls despite the no-call list, while those targeted by the law are not. The rights of entities blocked by a national "do-not-call" registry are not balanced; they are extinguished.

As Congress acknowledged when it adopted the TCPA, "pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors . . . demand[s] delicate balancing." 108/ This requires the government to assess the impact of the law on affected speakers, and if the measure restricts too much speech, it is invalid. In *Hill*, for example, a case involving protests outside medical facilities, the Court found an acceptable balance "between the constitutionally protected rights of law abiding speakers and the interests of unwilling listeners" by noting that the law imposed no restrictions on the number, size, text, or images on protest signs and that the required 8-foot separation between the speaker and the audience "should not have any adverse impact on the readers' ability to read signs displayed by demonstrators." Nor did the law preclude speakers from communicating

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108/ *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975); *Watchtower Bible*, 122 S. Ct. at 2088 ("there must be a balance between these interests and the effect of the regulations on First Amendment rights"). *See also Consolidated Edison Co. of New York v. Pub. Serv. Comm'n.*, 447 U.S. 530, 537, 541 (1980) (striking down restriction on billing inserts based on asserted need to protect residential privacy interests).

at a "normal conversational distance." 530 U.S. at 714, 726-727. Similarly, in *Frisby v. Schultz*, 487 U.S. 474, 483-484 (1988), the Court upheld a restriction on picketing when focused "solely in front of a particular residence," but held that the First Amendment required narrowing the law to permit picketers to disseminate their messages generally through residential neighborhoods and to "go door-to-door to proselytize their views" or "contact residents by telephone, short of harassment." In addition, a key aspect of both decisions was the content-neutral nature of the restrictions – a factor missing here, given the TCPA's exemptions and exclusions. *Id*. at 480-481; *Hill*, 530 U.S. at 722-723 ("the statute applies equally to used car salesmen, animal rights activists, fundraisers, environmentalists, and missionaries").

A national "do-not-call" registry, by contrast, imposes a preemptive ban on certain disfavored classes of telemarketers. A particular caller's ability to speak is determined by the category he or she falls into, not on whether the caller has ever failed to respect a consumer's "do-not-call" request. Since homeowners already have the legal ability to preclude any future calls by resort to company-specific "do-not-call" requirements, a national registry does not "balance" rights, it preempts them. Consequently, a national "do-not-call" registry would violate the First Amendment. 109/

109/ Although the government has some ability to regulate unwanted communications that may reach the home, *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the First Amendment precludes it from cutting off such speech entirely. *Action for Children's Television v. FCC*, 852 F.2d 1332, 1342-44 (D.C. Cir. 1988) (FCC must formulate "safe harbor" for indecent speech, and in doing so, must "determine what channeling rule will most effectively promote parental – as distinguished from government – control."). *See also Playboy Entm't Group*, 529 U.S. at 821-824 (blanket restriction on unsolicited "signal bleed" struck down where individual homeowners could use individualized case-by-case solution).

IV. THE COMMISSION SHOULD AMEND ITS RULES IMPLEMENTING THE TCPA TO REFLECT CURRENT CONDITIONS

A. The Commission Must Clarify the Areas Over Which It Has Exclusive Authority

The Commission must act to stem the growing confusion over telemarketing regulation by clarifying the areas over which the FCC has preemptive authority. States have been particularly aggressive in attempting to curb the incidence of telemarketing to their citizens. Great pride is exhibited in a "millions served" mentality, under which, for example, NAAG boasts that "[n]ationwide, more than 300 enforcement actions have been taken against telemarketers." NAAG at 15 n.34. Some states even indicate their intent to continue pushing the boundaries of their authority even if the Commission changes its rules and policies to divest states of authority in a given area. *See* NYCPB *Do-Not-Call* at 18 (NYCPB "does not believe that existing federal law [gives] the Commission authority to preempt state statutes, even for clearly interstate calls," so state "enforcement . . . will continue" notwithstanding FCC action). This mindset is particularly inappropriate in view of the importance of "promot[ing] consistency and uniformity in federal and state regulation of telemarketing practices." 110/

Two areas where exclusive FCC authority is particularly well-settled, but where states nonetheless have sought to regulate, involve interstate telemarketing and the use of customer premises equipment ("CPE") such as predictive dialers. 111/ This

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110/ Letter from Shirley L. Rooker, Chairperson, FCC Consumer/Disability Telecommunications Advisory Committee, to Marlene Dortch, Secretary, FCC, filed December 24, 2002, in CG Docket No. 92-90.

111/ *See Crockett Tel. Co. v. FCC*, 963 F.2d 1564 (D.C. Cir. 1992) ("FCC has exclusive jurisdiction to regulate interstate common carrier services"); *Essential Comms. Sys., Inc. v. AT&T*, 610 F.2d 1114, 1116 (3d Cir. 1979) ("FCC asserted exclusive jurisdiction over . . . customer-provided terminal equipment [and was] sustained").

has caused confusion and uncertainty, and threatens to subject teleservices providers to mutually exclusive or otherwise conflicting regulations. Consequently, the Commission should explicitly affirm its exclusive authority in these areas.

1. States Will Exceed Their Authority to Regulate Interstate Telemarketing Absent FCC Clarification of its Exclusive Jurisdiction

The comments clearly reflect the need for the Commission to clarify the allowable scope of state authority over interstate telemarketing calls. There is no doubt regarding the states' intent to try to regulate such calls. The state attorneys general unabashedly claim that "states have the power to prosecute persons placing calls outside the state," NAAG at 13-14, and states openly express their commitment to "enforcement of interstate calls." NYCPB *Do-Not-Call* at 18. Indeed, NAAG confirms that states "have enforced their own do-not-call database laws against telemarketers across the country, irrespective of whether the call was 'intrastate' or 'interstate.'" NAAG at 12; National Association of State Utility Consumer Advocates ("NASUCA") at 14 (identical language). NAAG goes on to note that "many states have taken legal action against telemarketers . . . calling into their states." NAAG at 12. *Accord* TOPUC at 10 ("the Attorneys General of all 50 states have . . . enforced their do-not-call laws against telemarketers irrespective of whether such calls are interstate").

This expansive reading of state power is flatly inconsistent with the Act's grant to the FCC of jurisdiction over "interstate communication," which includes any communication or transmission between different states. 112/ Notably, none of the

112/ *See* ATA at 107, citing 47 U.S.C. §§ 152(a), 153(22); Letter from Geraldine A. Matise, Network Services Division, Common Carrier Bureau, FCC, to Ronald A. Guns, Md. House of Delegates, January 26, 1998 ("Matise Letter"); *Operator Services*

commenting agents of state government or their associations address the Matise Letter, which was explicitly noted in the NPRM and provides a full analysis of the prohibition on state regulation of interstate telemarketing calls. *See* NPRM ¶ 66 n.220. Nor do any of the state commenters bother to discuss the *OSPA Ruling* which squarely supports the analysis in the Matise Letter. *See* ATA at 108. Instead, the state commenters simply assert generic powers, such as that to enforce consumer protection statutes under state long-arm statutes, *e.g.*, NAAG at 12; NYCPB, *Other Than Do-Not-Call* at 21, or offer generic preemption analyses. NYCPB, *Other Than Do-Not-Call* at 22-24. But such statements are not responsive to the analysis in cases like the *OSPA Ruling*, that demonstrate limitations on state jurisdiction in the specific area of interstate communications under the Federal Communications Act, and under Sections 223 through 227 in particular. See 47 U.S.C. § 152(b). The Commission must therefore educate state regulators about the limits of their power over interstate telemarketing calls.

There is no basis in the TCPA for the states' claim of authority over interstate telemarketing. Some commenters point to the reservation of state power in Section 227(e)(1) as grounds for states to have free rein to regulate interstate telemarketing. *See*, *e.g.*, NAAG at 11-12; NASUCA at 14. However, whatever power the TCPA leaves in the states' hands is clearly limited to authority over *intrastate* calls. Specifically, Section 227(e)(1) states that "nothing in this section or in the regulations prescribed . . . shall preempt . . . *intrastate* requirements or regulations . . . ." 47 U.S.C. § 227(e)(1) (emphasis added). Thus, while Section 227(e) may make it difficult to

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Providers of America Petition for Expedited Declaratory Ruling, 6 FCC Rcd 4475 (1991) ("*OSPA Ruling*").

reconcile a national "do-not-call" list with state "do-not-call" regimes, there is no doubt that nothing in Section 227(e)(1), or any other provision of the TCPA, conveys or even recognizes state authority over interstate telemarketing calls. The Commission must confirm this fact, and specifically hold in this proceeding that the states may not regulate telemarketing calls that cross state borders.

2. The Commission Must Exercise Its Preemptive Authority Over Predictive Dialers

Though the states are not as hawkish on the power to regulate predictive dialers as they are on interstate telemarketing, the record shows the need for an affirmative Commission statement that it has exclusive authority over such equipment. The states' aggressive stance on interstate telemarketing suggests that the absence of a clear FCC pronouncement in this area will leave them emboldened to act should they feel moved to do so. 113/ There is already a move afoot in some states to regulate the use of predictive dialer technology. 114/ The absence of a single, uniform approach to predictive dialers adopted at the federal level will leave teleservices providers open to the possibility of conflicting state standards, an outcome that will lead only to confusion and litigation, and not the establishment of any clear standards in this area.

113/ *Compare* National Ass'n of Consumer Agency Administrators (alleging "predictive dialer . . . usage has skyrocketed and . . . is especially troubling to consumer 'victims'"), *with* NASUCA at 14 ("Congress intended to provide their consumers with greater protections against telemarketers"), *and* TRA/TAG at 7 ("mak[ing things] easier for telemarketers . . . is not the focus the Commission should have when promulgating regulations").

114/ *See* ATA at 120 n.14; EPIC at 7 ("California will be implementing a 1% abandonment rate soon"); Household at 8; S.B. 918, 2003 Gen. Assem. (Va. 2003) (proposing to prohibit use of predictive dialers if telephone calls generated thereby do not immediately connect the person answering the call with a live telephone solicitor).

There is no doubt as to the Commission's authority to adopt a federal policy or rule governing predictive dialers to serve as the exclusive standard nationwide (or to forebear from adopting a specific rule to promote marketplace flexibility), and none of the state commenters explicitly suggest otherwise. In fact, the proposals by each of the state interests commenting on the matter indicate an intent to look to the FCC, not the states, to regulate predictive dialers. 115/ This is consistent with the rationale that, because predictive dialers are CPE, this Commission has exclusive authority to regulate them. *See* ATA at 120-121. This, too, is undisputed by the few commenters that addressed the issue. In addition, the TCPA expressly contemplates that the Commission alone will establish technical and procedural standards applicable to telemarketing practices such as the use of teleservices technology. 116/

The need for a single national policy on predictive dialers, even one that relies on natural incentives to not abuse their utility as part of legitimate means of generating sales, could not be clearer. As Reese Brothers notes "[i]t is virtually impossible with today's technology to manage abandoned calls on a state by state basis." Reese Brothers at 7. DMA explains that telemarketers cannot set predictive dialers to vary the abandonment rate (or the differing standards by which abandonment rates might be measured) from call to call, but rather, would have to resort to the unworkable option of reprogramming the system with each call, thus eliminating the efficiency gains predictive dialers are designed to provide. DMA at 24. This would be

115/ *See*, *e.g.*, NASUCA at 3-7 (calling for FCC regulation and "stronger enforcement"); City of Chicago at 9-11; PUCO at 19; TRA/TAG at 12; TOPUC at 3-4.

116/ *See* 47 U.S.C. § 227(e) (excepting "standards prescribed under subsection (d)" regarding "technical and procedural standards" from reservation of state authority).

wholly inconsistent with the Commission's intent to remain "[c]ognizant of the benefits of predictive dialing to the telemarketing industry." NPRM ¶ 26. The Commission must specify that its policy on predictive dialers, or any rule it adopts, divests the states of authority over predictive dialer regulation.

B. The Commission Should Approach Regulation of Predictive Dialers Cautiously

While the need for the FCC to prevent inconsistent regulation is clear, the call for aggressive Commission regulation is not, given the extent to which intervention could disrupt the market. As one commenter succinctly put it, "the industry uses predictive dialers because they greatly enhance overall efficiency." 117/ A number of commenters report that, without predictive dialers, telemarketing would be greatly undermined, if not rendered useless, as a meaningful marketing tool. 118/ Thus, in the interests of balancing consumer interests and those of "legitimate telemarketing," NPRM ¶ 1, the Commission should tread lightly in its approach to predictive dialers.

ATA agrees with the observation that the prevalence of predictive dialers is a relatively new development so that "[i]t is not clear that the Commission has the information or . . . expertise" at this juncture to support extensive regulation of their use. *See* Sprint at 8. Telemarketers need to make contact with subscribers, thus the industry already has a natural incentive to minimize instances of "dead air" and

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117/ MPA at 20. *Cf.* Newspaper Association at 15 ("Two-thirds of newspapers that engage in telemarketing use predictive dialers" due to "significant efficiency that [they] provide"); Scholastic at 11 (citing "tremendous efficiency gains of predictive dialer" and noting "transition from a manual call center to predictive dialer technology resulted in productivity gains of 30 percent").

118/ MPA at 21; Electronic Retailing Ass'n at 15; Comcast Cable Communications, Inc. ("Comcast") at 15. *Cf.* Reese Brothers at 9.

abandoned calls. Significant regulatory barriers to predictive dialer use will greatly undermine the "dramatic reduction in costs and enhanced . . . compliance capabilities" that predictive dialers provide. WorldCom at 42. The comments support the ideal that the Commission should approach the regulation of predictive dialer technology conservatively.

1. There is No Record Support for Declaring Predictive Dialers to be "Auto-Dialers"

As a threshold matter, the Commission should confirm that predictive dialers are not "automatic telephone dialing systems" under the TCPA or the FCC's rules, as predictive dialer use is not marked by the generation of "random" or "sequential" numbers as required to meet the TCPA's definition. 47 U.S.C. § 227(a)(1). Though a few commenters baldly maintain, without any legal or factual analysis, that "[t]here is no principled difference between an autodialer and a predictive dialer," EPIC at 12, and some use the terms interchangeably, *e.g.*, TOPUC at 4, the Commission must conduct a meaningful analysis before it applies a statutory prohibition to an entire class of equipment. 119/ Indeed, it is preposterous to suggest, in determining how or

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119/ *See USTA v. FCC,* 227 F.3d 450, 460 (D.C. Cir. 2000) ("It is well-established that 'an agency must cogently explain why it has exercised its discretion in a given manner' and that explanation must be 'sufficient to enable [a court] to conclude that the [agency's action] was the product of reasoned decisionmaking"), citing *A.L. Pharm, Inc. v. Shalala,* 62 F.3d 1484, 1491 (D.C. Cir. 1995), *quoting Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 48, 52 (1983). The TCPA also does not support proposals that the FCC adopt a "new class of equipment called 'telephone broadcasting equipment,'" nor does it make any sense to "require that anyone that hooks up equipment to the public switched network . . . have a 'telephone broadcast license.'" Californians Against Telephone Solicitation at 2. Such efforts would run counter to the Commission's long-standing effort to *de*-regulate classifications of service and CPE rather than inventing new categories and licensing schemes. *Telecommunications Services Inside Wiring,* 11 FCC Rcd 2747, 2766 (1996); *Procedures for Implementing the Detariffing of Customer Premises Equipment and*

whether to regulate predictive dialers, that "the Commission need not identify the specific technologies addressed" by rules that target "automated or prerecorded calls to consumers." NASUCA at 4. Either a device falls within the statutory definition of "automatic telephone dialing system" (which the FCC has no authority to revise), or it does not – as is the case with predictive dialers. 120/

Only one commenter, the City of Chicago, endeavored to make a substantive argument that predictive dialers satisfy the definition of "automatic telephone dialing system" under Section 227(a)(1). City of Chicago at 9-10. This analysis is flawed, however, because it asks the Commission to ignore the statutory definition, something the Commission may not do. 121/ The City believes that the definition should apply to all types of equipment regardless of "whether they generate telephone numbers randomly or arbitrarily or use numbers from a database." City of Chicago at 9. The City labels "artificial" any attempt to distinguish, "based on the source of the numbers called," among the kinds of telecommunications equipment that

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Enhanced Services (Second Computer Inquiry), 3 FCC Rcd 477, 482 (1988). In any event, the proposal offered by Californians Against Telephone Solicitation is not only an invitation to regulatory overkill, it is needlessly baroque as well.

120/ NASUCA's claim that use of predictive dialers "benefits only telemarketers, by allowing them to make more calls and contact more people," NASUCA at 5, reveals more of the ignorance about telemarketing practices that ATA highlighted in its initial comments. ATA at 4, 7. As noted, cost-effective telemarketing, including that aided by predictive dialers, helps make more goods and services available to consumers, at lower prices, and contributes significantly to the national economy, both directly and by providing needed employment opportunities. *See id*. at 9-18. *Accord* WorldCom at 41 ("Predictive dialers are a critical marketing tool because 86% to 89% of all outbound dialing does not reach an actual person.").

121/ *See ACLU v. FCC,* 823 F.2d 1554, 1565-1570 (D.C. Cir. 1987) (holding that FCC could not, as part of its regulations implementing the Cable Act of 1984, adopt a definition for the term "basic cable service" that differed from the definition of that same term in the Act).

teleservices providers may use. *Id*. These arguments, however, ignore the very thing that makes autodialers "autodialers" – their reliance on random or sequential phone numbers. *See* 47 U.S.C. § 227(a)(1); 47 C.F.R. § 64.1200(f)(1). Stripped of this distinction, the City's argument collapses to the assertion that any "machine" that can dial a phone – including, ostensibly, the myriad phones used by businesses and consumers that can store and redial phone numbers – is an "autodialer." 122/ The City seems to believe that because it opposes both the ability of autodialers to reach consumers, and the ability of predictive dialers to do so as well, the technologies are the same under the terms of the TCPA. But this analysis faces a significant barrier – the language of the statute itself.

As virtually every party that commented on this issue points out, the fact that predictive dialers do not rely on random or sequential numbers, but rather only replace the dialing and timing functions of a human operator, places predictive dialers outside the TCPA definition of "automatic telephone dialing system." *E.g.*, Verizon at 23; Consumer Bankers Ass'n at 7. As Verizon notes, "[t]here is nothing inherently troublesome about a device that dials telephone numbers, as opposed to having human fingers do the dialing." Verizon at 22. Indeed, where the "telephone numbers [are] specifically programmed into the equipment" by the operator "from a list provided by the sender of valid telephone numbers," the requisite randomness or sequentiality is missing. Xpedite Systems, Inc. at 11. There is no doubt the "primary function" of

122/ In fact, taken to its absurd extreme, this logic could even argue that hand-dialed calls fall within the definition. Josh Friedman, *Tuned In: A Look Inside an Amazing Machine*, LOS ANGELES TIMES, Feb. 26, 2002, at F12 ("the human body has been called one of the world's most exquisite machines"); *In the Balance*, CHEMIST & DRUGGIST, May 2, 1998 ("The human body is the most remarkable machine . . . .").

predictive dialers, rather than enabling a scattershot approach that might fortuitously reach interested prospective customers, "is to call a [pre-specified] set of telephone numbers at a rate that enables a sales person to be available[.]" MasterCard at 6. The principal feature of a predictive dialer, therefore, is a timing function, not number storage or generation. 123/ As such, the Commission must find that predictive dialers are not "automatic telephone dialing systems" or "autodialers" for purposes of the TCPA or the FCC rules. 124/

2. The Commission Should Reject the Reactionary Demands for a Ban on Predictive Dialers or a Zero Abandonment Rate

The Commission must maintain its sensitivity to the "benefits of predictive dialing to the telemarketing industry," NPRM ¶ 26, by ignoring the call by a handful of commenters who seek abandonment of efforts to balance consumer and business

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123/ Bank of America at 5 ("a given set of phone numbers that the business intends to call are loaded and the [predictive dialers] work to predict the timing" of calls); Household at 7 ("Predictive dialers are simply dialing machines with a computer program . . . that assist[s] in predicting the most likely time the consumer can be contacted.").

124/ The clear fact that predictive dialers are not autodialers renders irrelevant the City of Chicago's proposition that the FCC not change "the random and sequential call prohibitions . . to accommodate the industry." City of Chicago at 10. Nonetheless, we note the following. Teleservice providers do not "wish to avoid the cost of market research." *Id*. In fact, only through reliance on such data does telemarketing become cost effective. *See* ATA at 113. Nor is it a question of whether "the industry has developed [or] perfected [its] technologies." City of Chicago at 10. Rather, teleservices providers resist the notion that they should be constrained in their efforts to develop and deploy tools – other than "autodialers" – for legitimate business purposes. Notably, no commenter argued that teleservices providers should be permitted to use autodialers as that term is defined by the statute. Thus, the City's suggestion that the Commission simply sweep all dialing apparatus into the category of banned automatic telephone dialing systems, *id*. at 9-10, is not only unprincipled, it is unnecessary as well. ATA agrees with the City that the Commission should not "dilute its regulations," *id*. at 10, including those that meaningfully distinguish between permitted and prohibited teleservices equipment.

interests in favor of outlawing or precluding all use of predictive dialers. These parties favor an outright ban on predictive dialers, National Consumers League at 4, or request a zero abandonment rate that would effectively prevent the use of predictive dialers. 125/ However, the extreme position taken by these parties would serve only to greatly hamstring the teleservices industry while failing to seriously address the problems ascribed to predictive dialing. Such demands, therefore, should be summarily rejected.

There can be no doubt that "any regulation that . . . bans the use of predictive dialers will substantially increase sales costs, which will ultimately be borne by consumers and harm competition." WorldCom at 43. *Cf.* Newspaper Association at 15 ("Banning predictive dialers would erode the significant efficiencies that [they] provide to newspapers of all sizes."). These significant costs that would arise from a ban on predictive dialers or a zero abandonment rate 126/ would not be sufficiently offset by benefits to consumers. Even those advocating a zero rate acknowledge that "abandoned calls are often related to busy signals, no answer, hang-ups or answering devices." TRA/TAG at 12. Forcing teleservices providers to forego the benefit of predictive dialers to cut short these unproductive calls serves no purpose. Such calls cause none of the "aggravation," "frustration" or "suspicion" that some parties ascribe to calls answered by a live recipient only to find no one on the line. National Consumers

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125/ NAAG at 35; TRA/TAG at 12; Private Citizen at 6; EPIC at 12.

126/ An abandonment rate significantly less than five percent greatly reduces the benefit of employing predictive dialers, and a zero abandonment rate wholly destroys the benefit of using a predictive dialer and is thus tantamount to a ban on the technology. *See*, *e.g.*, Comcast at 15 ("A zero percent . . . abandonment rate would result in a cost-prohibitive loss of productivity and would probably force Comcast to severely curtail or altogether eliminate outbound calling.").

League at 4, EPIC at 12. Equating predictive dialer use to prank calls by children, and the refusal to acknowledge any "legal, moral or financial" reason to allow their use, Public Citizen at 7, overlooks the benefits that efficient telemarketing can offer. 127/

In addition, calls for a zero abandonment rate are wholly unrealistic. Such a standard is not achievable, as it leaves no room for even human error, let alone that on the part of a machine. As Reese Brothers point out, predictive dialers are "by necessity a statistical instrument and statistics are managed by probabilities . . . rather than certainties."). *See* Reese Brothers at 5. *Cf.* Scholastic at 12 ("If an abandonment rate is set, it should be consistent with the technology's practical limitations."). Moreover, a zero abandonment rate seeks to impose a standard that also is unachievable by the only alternative to predictive dialer use – hand-dialed calls. 128/ While some may envision a perfect world where "[t]elemarketers could still use predictive dialers to replace manual dialing by live operators, so long as it did not result in any abandoned calls" whatsoever, EPIC at 12, the condition precedent for such use

127/ MPA at 20 ("predictive dialers provide significant benefits to both consumers and industry"). *Cf.* Visa U.S.A., Inc. ("Visa") at 8 ("Prohibiting the use of predictive dialers would increase the costs of goods and services . . . for those who have chosen to receive telemarketing calls, without providing those consumers any corresponding benefits."); National Ass'n of Ind. Insurers at 2 ("limitations on the use of predictive dialers . . . would . . . result in increased costs and reduced choice for American consumers").

128/ DMA at 24; MBNA at 7 ("Even in a completely manual environment there would be times when a customer would pick up the telephone at the very moment the representative hangs up to dial another number."); *accord* Electronic Retailing Ass'n at 14 n.5 ("Calls can be 'abandoned' . . . when placed manually as well as when placed via predictive dialer.").

– absolutely zero abandoned calls – is simply not technically achievable using *any* technology (including hand-dialing). 129/

A zero abandonment rate is also contrary to the objectives its proponents claim to advocate, since "predictive dialers *reduce* the risk of human dialing error." WorldCom at 41 (emphasis added). Predictive dialers "provide a method of controlling the quality and accuracy of the calls being made," thus increasing the probability that a telemarketer will reach a subscriber who is potentially receptive to the sales call. *Id*. at 42. As the Newspaper Association explains, "predictive dialers are an efficient and effective means for complying with existing 'do-not-call' regulations because [their] databases are easier to scrub." Newspaper Association at 16. *Accord* Seattle Times at 1 ("Predictive dialers have improved our ability to scrub databases, allowing better adherence to . . . regulations."); DialAmerica at 8 (reporting that, with predictive dialers, "every call has an electronic 'trail,'" and "[a]ll calls can be accounted for").

All told, an FCC requirement to set abandonment rates at a reasonable level (as determined by the industry or by the Commission), instead of at zero would not be "blessing" predictive dialer abuses, as some commenters suggest. NAAG at 35. Rather, it would recognize both the economic and efficiency benefits of predictive dialer

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129/ The proposition that the FCC impose a zero abandonment rate on the tele-services industry, regardless of the cost, Private Citizen at 6, would not only harm consumers as shown above, it rests on an analogy that relies on a misunderstanding of the law. In arguing for a zero abandonment rate, Public Citizen suggests "[r]egardless of the cost to the proprietor, a restaurant must be 'handicapped-friendly' or it is out of business." Public Citizen at 6. However, similar to the approach ATA advocates here, the Americans with Disabilities Act takes much greater recognition of reasonable business needs than Public Citizen suggests. *See*, *e.g.*, 28 C.F.R. § 36.304 (requiring removal of barriers only "where such removal is readily achievable, *i.e.,* easily accomplishable and able to be carried out without much difficulty or expense").

use, as well as the extent to which the technology aids businesses with legal compliance and proper targeting of teleservice campaigns. *E.g.*, Newspaper Association at 16 n.45. In short, it would achieve exactly what the TCPA requires – "balancing [privacy rights and commercial freedoms] in such a way that . . . permits legitimate telemarketing," NPRM ¶ 1 – while at the same time achieving the FCC's goal of not negating the "benefits of predictive dialing to the telemarketing industry." 130/

3. The Commission Should Allow Industry Practices to Develop Predictive Dialer Standards

The Commission should forego establishing a maximum abandonment rate for predictive dialers by regulatory fiat, and should instead rely on the teleservices industry's natural incentives and self-regulation to govern acceptable practices. ATA agrees that it is still too early in the development and deployment of predictive dialers for the Commission to adopt bright-line rules governing their use. 131/ As MBNA notes, "a number of factors can cause [telemarketer] representative availability at any particular [time] to vary widely (*e.g.*, time of day; list quality; representative experience)." 132/ Adopting rules for "statistical instruments" such as predictive dialers is particularly difficult with respect to outbound telemarketing, because:

130/ NPRM ¶ 26. *See also* MBNA at 7 ("a balancing of interests argues against rules that prevent . . . reasonable use" of predictive dialers); Reese Brothers at 9 (noting the "primary cause of [predictive] dialer abandons is . . . the statistical nature of the dialer," and that "AMD is a necessary component of predictive dialing technology," without which, "all consumer-oriented telemarketing firms [would be] out of business").

131/ *See*, *e.g.*, Sprint at 8; Cendant Corp. at 3 ("Restrictions on predictive dialers are premature."); DialAmerica at 8 ("Predictive dialing really came into outbound telemarketing in the mid 1990's.").

132/ MBNA at 7; *accord* Electronic Retailing Ass'n at 16 ("Abandonment rates will vary significantly based on the time of the call, type of campaign, number of operators available, number of telephone lines employed . . . and other factors."); MPA at 21

> the character of the data rapidly changes due to a wide variety of factors (time of day, agent pool, list characteristics, offer and product, weather and television programming, etc.) and "local conditions" can and do change at any moment in time (e.g., an unprojected clumpiness to the data, such as a high sales rate in a micro-sample . . . or even a specific group of agents exiting a calling session).

Reese Brothers at 5. ATA thus agrees that, before acting, "the FCC [should] study current industry practices" before endeavoring to set hard caps or otherwise adopt rules mandating specific predictive dialer abandonment rates. 133/

With respect to abandoned calls, the Commission should allow the industry to set "a rate [that is] flexible enough to allow businesses to use predictive dialers in a responsible and meaningful way, while also preventing irresponsible use[.]" Consumer Bankers Ass'n at 8; MasterCard at 7 (same). In allowing flexibility, the Commission could still adopt guidelines that would prevent abuse, such as specifying that telemarketers may abandon only "a reasonably small percentage of calls." Discover Bank at 9. This approach is preferable to the FCC simply picking an abandonment rate for all uses in all circumstances, especially given that "[i]f the abandonment rate is set too low, there may be a significant reduction in the productivity of telemarketing operations and some companies . . . could be forced to abandon telemarketing campaigns entirely." MPA at 21. ATA thus agrees with AT&T Wireless

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(citing "fluctuations . . . due to differences in calling times, types of offers, number of operators available, and other [ ] factors").

133/ MasterCard at 7. *Accord* Household at 8 ("the Commission should study current industry practices to determine an appropriate rate of abandoned calls . . . that is flexible enough").

that "[t]he Commission should be cautious not to place restrictions on dialing devices that limit their proper and beneficial use." AT&T Wireless at 22.

Avoiding the establishment of mandatory abandonment rates that are too low is particularly important with respect to small business. As the Electronic Retailing Association notes, "telemarketers with older predictive dialer equipment may well lack the technological capability of achieving the lower abandonment rate, and as such, could face the prospect of . . . significant capital expenses to upgrade" that [f]or smaller telemarketers, with more limited financial resources . . . could be prohibitive." Electronic Retailing Ass'n at 15. The net result would be that "[t]hese smaller companies would essentially be forced to cease using predictive dialers, which would drastically reduce their [ ] productivity and place them at a distinct competitive disadvantage with respect to larger call center operations[.]" *Id*. *Accord* MPA at 21 ("smaller [telemarketing] service providers will be unlikely to be able to absorb the increased costs associated with lower productivity rates [from] imposition of an overly restrictive standard . . . . [which] would likely drive a number of those small businesses out of existence").

There is ample support in the record for forbearing from specific regulation and allowing industry to set the standard, *e.g.*, Household at 8, Intuit at 8, and there is significant evidence that predictive dialer users are already maintaining low abandonment rates, either in reliance on the DMA standard (discussed further below) or on their own. 134/ Consequently, a rigid approach, if imposed by rule, would serve

134/ *See*, *e.g.*, Sprint at 6 ("voluntarily complies with, and attempts to beat, the DMA's 5% . . . standard"); MBNA at 8 ("MBNA adheres to this strict [5%] standard but strives to have abandonment rates as close to zero as possible); WorldCom at App. C, ¶ 8.

only as "governmental regulations aimed at mandating uniform acceptable dropped call rates [that] are arbitrary and counter productive." Intuit at 8.

Granting the industry flexibility to set abandoned call rates that both allow legitimate use of predictive dialers while avoiding consumer alienation is supported by natural incentives faced by every business. Even predictive dialer opponents recognize that "persons engaged in telemarketing should not desire to alienate consumers." NAAG at 46. Intuit is one example of a company that, "with our customer's satisfaction in mind is continuously working to lower our dropped call rate when using predictive dialing technologies." Intuit at 7. Companies "that use predictive dialers have strong incentives to minimize abandonment rates," including not only consumer alienation, but also as a result of "toll charges to telephone companies [that are paid] whenever a consumer answers an interstate telemarketing call, even an abandoned call." Newspaper Association at 16. Consequently, the Commission should depend on industry incentives and self-regulation to help control abandoned calls in lieu of adopting what will likely be a complex set of new rules.

4. If the Commission Does Adopt Predictive Dialer Standards, the Industry Consensus of a Five Percent Abandonment Rate Should Govern

If the Commission adopts a maximum abandonment rate notwithstanding the problems with that approach identified above, the great weight of evidence in this proceeding indicates that five percent is the appropriate rate. This figure is reflected in the comments of virtually every industry that mentions a specific rate for application in the event the Commission finds it necessary to set one. This includes communications

companies, 135/ banks, 136/ retailers, 137/ publishers, 138/ and telecommunications providers. 139/ Even some predictive dial opponents indicate that a five percent standard is acceptable. *E.g.*, NYCPB, *Other Than Do-Not Call* at 11. A maximum abandonment rate of five percent is also consistent with the current industry standard established by DMA, with which the above-referenced companies, and likely many others, already comply. *See* DMA at 31.

There is good reason the industry has targeted, and the Commission should accept, five percent as the appropriate abandonment rate. As Sprint notes, "the DMA's 5% abandonment rate standard . . . was established based on the extensive experience of companies engaged in telemarketing activities in numerous sectors of the economy." Sprint at 6. Comcast's projections bear out this experience:

> Requiring predictive dialers to be set at a rate less than five percent would drastically reduce the efficiency of telemarketing call centers. For example, in the event that Comcast is forced to operate its predictive dialers at a maximum acceptable abandonment rate of three percent, average call center productivity would drop to approximately ten contacts per hour. At a maximum one percent abandonment rate, Comcast estimates that its call center productivity would fall to only three or four contacts per operator, per hour. A zero percent abandonment rate would result in a cost-prohibitive loss of produc-

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135/ Comcast at 14-15.

136/ American Bankers Ass'n at 3; Consumer Bankers Ass'n at 8; Bank of America at 5; MBNA at 8.

137/ Electronic Retailing Ass'n at 16.

138/ MPA at 21; Newspaper Association at 17; Seattle Times at 1.

139/ Sprint at 7. *See also* Cendant at 3; DialAmerica at 10. *But see* Reese Brothers at 6 (advocating "abandonment rate of 7% as the maximum, with a goal of 5%).

> tivity and probably would force Comcast to severely curtail or altogether eliminate outbound calling. 140/

The five percent abandoned call rate adopted and followed by the industry, and advocated here, greatly limits the number of calls likely to lead to consumer consternation. As DialAmerica explains, "[t]he average consumer receives 82 telemarketing calls a year. A 5% abandonment rate would mean that the average consumer would receive four abandoned calls a year or one every three months." DialAmerica at 10, citing FTC Forum transcript June 6, 2002, page 92. *See also* Reese Brothers at 8 (noting that even "[i]f a consumer receives one telemarketing call every day of the year, or seven calls each week, a 7% abandon rate will result in one abandoned call every two weeks"). 141/

All told, the comments support ATA's proposal that, if the Commission regulates abandonment rates it should do so by adopting rules "no more stringent than the five percent DMA standard." ATA at 111-112. If the Commission decides to adopt such a standard, it must take great care in crafting the rule so that it specifies that teleservices must set their predictive dialers to achieve a ratio of dropped calls to calls answered of no more than five percent. *Id*. This level of specificity is required in view

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140/ Comcast at 15. Though there is some suggestion that something less than five percent may be attainable, Seattle Times at 1; WorldCom at App. C ¶ 8 ("3% to 5% is the lowest feasible rate possible in order to obtain the productivity benefits of predictive dialers"); DMA at 31 ("a cap of less than 3% . . . is not realistic), the evidence overwhelmingly shows most companies are unable to feasibly conduct telemarketing at less than a five percent abandonment rate.

141/ Notably, the DMA's standard specifies that, in addition to the five percent rate, "[t]elemarketers also should not abandon the same telephone number more than twice within a 48-hour time period and not more than twice within a 30-day period of a marketing campaign." DMA at 31 (internal quotation omitted). This also minimizes the incidence of abandoned calls that any given subscriber receives.

of the varying terminology utilized by the commenters to describe the same standard. *Compare*, *e.g.*, Seattle Times at 1 (advocating "a 5% or higher abandonment rate") *with*, *e.g.*, Comcast at 14 (advocating "a maximum 'abandonment rate' . . . no lower than five percent"). 142/

Finally, the Commission should resist the temptation to simply adopt the same three percent standard the FTC recently made a part of its rules. 143/ Though the FTC claims its rule is "supported by the record," SBP at 171, its "analysis" consisted of no more than acknowledging that some commenters favored a zero rate, others argued against any one-size-fits-all rule, while still others supported the five percent DMA standard, then "splitting the baby" at three percent. *Id*. at 172. The only record evidence the FTC acknowledges in reaching its conclusion is that all of two tele-marketers "essentially" supported three percent, *id*. and that that "standard is also consistent with the California [PUC's] Interim Opinion regarding predictive dialer use[.]" *Id*. at 173. The FTC noted ATA's objection that the three percent standard "would result in 'a significant drop in efficiency,'" but simply chose not to respond to this impact. *Id*.

The FTC's approach cannot be considered reasoned agency decision-making. As a threshold matter, the FTC improperly undertook to regulate predictive

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142/ *See* DMA at 31-32 (setting out intricacies involved in defining and regulating predictive dialer use and AMD technology). ATA agrees with MAP and other commenters who propose that the Commission should, if it finds it necessary to define "abandoned calls," limit the definition to those "disconnected by the predictive dialer because no operator was available" and exclude "[c]alls which are disconnected for other reasons, such as no response from the consumer." MAP at 22. *Accord* Reese Brothers at 6. In supporting this definition, ATA assumes that the phrase "no response from the consumer" will be interpreted broadly enough to encompass calls that are not answered at all, including busy signals, those answered by voicemail or an answering machine, and those terminated due to line trouble or other technical difficulties.

dialers in the first place, given this Commission's exclusive jurisdiction over CPE, and the FTC's reliance on the California PUC approach (set forth in an "interim opinion," no less) is misplaced for the same reason. In addition, the FTC's "analysis" falls on the slight side, to say the least. Of particular note is that the FTC's discussion reveals all but two telemarketers commenting on this issue favored either no standard, a "reasonableness" standard, or five percent. SBP at 172. Nevertheless, the FTC ignored the position taken by the vast majority of commenters in favor of that "essentially supported" by a minuscule minority of two commenters. *Id*. at 173.

In the end, the FTC simply ignored the problems a three percent rule presents for the industry. Here, the Commission should not abdicate its exclusive jurisdiction over CPE like predictive dialers, but should make clear its authority in this area. After doing so, if the Commission chooses to regulate predictive dialing abandonment rates, it should set a standard that is "[c]ognizant of the benefits of predictive dialing to the telemarketing industry." NPRM ¶ 26.

C. The Commission Should Reduce the Retention Period for Company-Specific "Do-Not-Call" Lists

The comments support a significant reduction in the amount of time that "do not call" requests must be retained under the FCC's TCPA rules from the 10 years currently required, *see* 47 C.F.R. § 64.1200(e)(2)(vi), to a more reasonable period that better reflects consumer behavior and experience. The comments reflect that "do-not-call" lists "become obsolete long before ten years," American Bankers Ass'n at 8, given

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143/ *See* 16 C.F.R. §§ 310.4(b)(1)(iv) & 310.4(b)(4)(i).

"the mobility of the population [and] frequent changing of . . . telephone numbers." 144/ Given that this change in telephone numbers is not currently met with a corresponding change in "do-not-call" list retention, a significant reduction in the current requirement is in order, not just in the name of list accuracy, but to "strike[ ] a reasonable balance between speech and privacy interests" as well. Qwest at 5.

Indeed, the commenters in the best position to assess the extent to which consumers' telephone numbers (and therefore their "do-not-call" preferences) remain constant – the telephone companies – concur that the current retention period is "far too long." Verizon at 6. Notably, Qwest and Verizon, each of which serve as the local phone company for millions of customers across multiple states, report that the level of telephone number "churn" is so high as to make ten-year-old "do-not-call" lists woefully inaccurate. *See* Qwest at 4-5. Verizon Wireless notes that this is "particularly true with wireless numbers." Verizon Wireless at 8.

The importance of having a retention requirement that more closely tracks population mobility and telephone number changes is clear. One of the key problems with reassigned telephone numbers is that they "remain on [companies'] lists, even though the new subscribers have given no indication that they wish to restrict telemar-

144/ American General Financial Services at 3. *See also*, *e.g.*, Electronic Retailing Ass'n at 5, citing U.S. Census Bureau, *Mobility Status of the Population by Selected Characteristics: 1980 to 2000*, Statistical Abstract of the United States: 2001 ("Fifteen percent of the population moved between 1999 and 2000 alone."); Household at 4 ("approximately 20% of American households move every year and [ ] on average each household moves approximately every five years."); DMA at 17.

keting calls[.]" 145/ DMA notes that "[m]arketers are deprived of a legitimate potential contact when a person who has asked to be placed on a do-not-call list moves and a new customer receives that number." DMA at 17. Moreover, modifying the retention requirement will aid not just telemarketers, but consumers as well. As WorldCom points out, "consumers who never requested to be placed on a particular company's do-not-call list are being denied a potentially valuable contact by the company." 146/

The comments offer a variety of proposals for a shortened retention period. Notably, only one institutional commenter, the Texas Office of Public Utility Counsel, favored retaining the ten-year rule, but it offered no analysis or reasoning for its position, TOPUC at 4, and its suggestion is offset by, among others, the Ohio PUC, which favored a reduction to five years. PUCO at 17-18. Unlike TOPUC, the Ohio PUC supported its position by noting that the reduction to five years would "provide . . . an opportunity to determine if customers have reevaluated their feelings about receiving telemarketing calls" and would "help ensure the list's accuracy." 147/ At the other end of the spectrum, some commenters favor a retention period as short as 18 months. Call Compliance at 7. While a number of commenters focused on the five-year period

145/ MBNA at 6. *Accord* Household at 4 ("telemarketers are not able to contact consumers with new phone numbers which appear on the list because a previous subscriber with that number requested do-not-call status").

146/ WorldCom at 40. *Accord* DMA at 17 ("Customers who wish to receive calls but who are assigned a phone number on a do-not-call list are similarly harmed because they cannot receive the calls.").

147/ PUCO at 17-18. *Cf.* DMA at 17 ("In a five year period, a marketer's products or services may significantly change and a consumer may change his or her mind about being on that company's do-not-call list.").

proposed on reconsideration of the *TCPA Order*, 148/ just as many commenters propose a shorter requirement. Both Household and Verizon, for example, suggest a retention period of two to three years, Household at 4; Verizon at 6, similar to ATA's suggested two-year period. ATA at 95-98. Qwest, Verizon Wireless and the Newspaper Association all support a three-year period, Qwest at 4-5; Verizon Wireless at 7; Newspaper Association at 8, while the Mortgage Bankers Association suggests four to five years. Mortgage Bankers Ass'n at 7. Given this range of choices, ATA submits that the two-year retention requirement it proposes strikes an appropriate balance between not only telemarketer and consumer needs, but among the proposals of other commenters as well.

Finally, there should be triggering mechanisms for removing a number from a company's "do-not-call" list other than consumer requests or expiration of the retention period. ATA agrees that deletions should occur in the event of a residence change, phone number change, phone number reassignment, or other similar events indicating that a consumer who has made a "do-not-call" request is no longer associated with the number for which the request was made. 149/ ATA further agrees that "[m]arketers . . . should be allowed to cross-reference numbers with the Postal Service's National Change of Address . . . system to verify that a number has not been reassigned." WorldCom at 40. In short, the rules governing both the retention period

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148/ *See*, *e.g.*, DMA at 16-18, citing *TCPA Recon. Order*, 10 FCC Rcd at 12398. *See also* American Bankers Ass'n at 8; American General Financial Services at 3; Electronic Retailing Ass'n at 6; Household at 4; WorldCom at 40.

149/ *See* American General Financial Services at 3. *Cf.* Newspaper Association at 8 ("use of phone numbers alone to opt-out from a company's telemarketing, without requiring a name in addition, contributes to [the] problem" of list inaccuracy).

and removal of a telephone number from a company's "do-not-call" list should better reflect prevailing economic reality and consumer preferences.

D. Telemarketing Calls to Wireless and Wireline Phones Must Be on Equal Footing

As ATA noted in its initial comments, there is little that the Commission need do with respect to teleservice calls to wireless phones, provided it properly determines predictive dialers are not "automatic telephone dialing systems" or "autodialers." *See* ATA at 129. The record amply supports such a finding. *See supra* Section IV.B.1. With this finding in place, the Commission is free to simply affirm that wireless and wireline phones may be treated identically for purposes of the TCPA rules. *Accord*, *e.g.*, Household at 10; BMO Financial Group ("BMO") at 5. Even state comments favoring layer upon layer of telemarketing regulation support the position that "rules that apply to . . . home telephone numbers . . . are equally appropriate for cell phones." NYCPB *Other Than Do-Not-Call* at 19. This approach, it is noted, "would also simplify enforcement, particularly for phone numbers that are ported from wire to wireless." *Id*. Even AT&T Wireless, which would likely be among the first to hear of customer dissatisfaction arising from telemarketing to wireless phones, *see* AT&T Wireless at 30 n.57, supports to a large degree treating wireless and wireline subscribers similarly (though it believes the former should not be deemed "residential"). *Id*. at 30-32. *Accord* Cingular at 6 (FCC should "mak[e] clear that CMRS subscribers have the right to have their phone numbers included in [ ] company-specific do not call lists"). 150/

150/ Commenters suggesting that auto safety somehow compels treating teleservice calls to wireless phone differently from those to wireline phones are merely grasping at straws. City of Chicago at 13; National Consumers League at 7. There is no evidence that teleservices calls to wireless customers driving motor vehicles are any more or less

Notably, there is nothing in the comments to suggest that telemarketing to wireless phones is a significant problem. 151/ Commenters most qualified to assess the extent of such telemarketing – wireless telecommunications providers – indicate that "consumers rarely receive solicitations on wireless phones." AT&T Wireless at 29-30. Cingular agrees, noting that "the [ ] rules implementing the TCPA and industry self-regulation adequately protect wireless consumers." Cingular at 4-7. Cingular also reports that "representatives of the CMRS and telemarketing industries have been actively working to ensure that telemarketing does not become a problem for CMRS subscribers" with the result that "CMRS subscribers have largely been immune" from the receipt of such calls. *Id*. at 4.

The Commission should reject the demands by a handful of commenters for a specific outright ban on teleservices calls to wireless phone numbers. 152/ Some commenters take an even harder line, arguing that a ban on telemarketing to wireless phones should be put in place "regardless if the called party is charged or not." TOPUC

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safe than other incoming wireless calls, and the incidence of teleservices calls to wireless phones is miniscule in any event.

151/ *See*, *e.g.*, American Bankers Ass'n at 5 ("We are not aware of any telemarketing made to cellular phones today."); BMO at 5 ("It is not our practice to target wireless telephone numbers"); Discover Bank at 9 (same). *Cf.* Consumer Bankers Ass'n at 9 ("wireless numbers are generally not targeted, and . . . usually receive protections as though they [are] residential"). *See also* ATA 123 & Ex. 12 (fewer than 15 percent of wireless phone owners report having ever received a telemarketing call on their wireless phones); ATA Ex. 16.

152/ *E.g.*, NASUCA at 19; PUCO at 21-22. In view of the approach advocated here and in its initial comments, ATA opposes the notion that all wireless companies should be forced to automatically place their customers' phone numbers on any type of "do-not-call" list. PUCO at 22. PUCO's suggestion to this effect wholly disregards consumer choice and self-determination, the core interests at the heart of any effort to regulate telemarketing.

at 7. But the wireline/wireless substitutability and competition the Commission has long worked to facilitate 153/ runs directly counter to any suggestion that "[a]s the wireless market becomes larger and more and more consumers have wireless telephones, it is imperative that the . . . rules . . . prevent telemarketers from calling wireless telephones." NASUCA at 19. Indeed, as BellSouth notes, "[b]ecause of favorable pricing options, many people today use their wireless phones as a substitute for their landline phone," such that telemarketing "[c]alls to a wireless phone . . . may be welcomed to those consumers that want to be contacted about products or services." 154/ Moreover, it is possible that treating wireless and wireline phones

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153/ *See* ATA at 124-125, citing *Verizon Wireless's Petition for Partial Forbearance*, 17 FCC Rcd 14972, 14973 (2002); *Telephone Number Portability*, 11 FCC Rcd 8352, 8434-36 (1996); *Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, 11 FCC Rcd 2445 (1996); *Amendment of the Commission's Rules to Permit Flexible Service Offerings in the Commercial Mobile Radio Services*, 11 FCC Rcd 8965, 8967-69; *Federal-State Joint Board on Universal Service*, 16 FCC Rcd 19144, 191151-52 (2001).

154/ BellSouth at 7. The comments reflect that the distinction between calls to wireline phones and to wireless phones for which the called party pays continues to dissolve. *E.g.*, Center for Democracy & Technology at 2. *But see* NASUCA at 19 (claiming, without recognition of evolving wireless plans or usage, that "wireless subscribers have to pay to receive telemarketing calls"). The argument that wireless and wireline phones are different because wireless customers pay for incoming calls is thus increasingly harder to support. Wireline customers pay for incoming calls as well, as part of the flat fee they pay for unlimited local use of their phone. It is easy to make the computation, for any given month, to determine the per-minute cost of such calls. The fact that the cost may differ month-to-month, based on the number of incoming call minutes, does not change the fact that the customer pays for them. An identical computation must be made with respect to incoming wireless calls for subscribers with plans that feature a bucket of minutes and/or unlimited calling during certain parts of the day or week. *See* ATA at 131. The market has thus evolved to the point that there is relatively little difference between the cost of incoming wireless and wireline calls. *See*, NYCPB, *Other Than Do-Not-Call* at 19 ("Many New Yorkers use their cellular service primarily for residential use."); Sprint at 20 ("wireless phones are displacing residential landline phones").

differently could in fact "stifle the evolution of mobile commerce (also referred to as 'm-commerce')." Consumer Bankers Ass'n at 9.

To the extent the Commission is considering any differential treatment between wireless phones and residential phones, it is apparent that companies engaged in telemarketing are in need of a means to distinguish between wireline and wireless phone numbers. American Bankers Ass'n at 5; BMO at 5; Visa at 8. The comments also make clear, however, that it is "inherently difficult to distinguish between wireless and wireline phone numbers." Consumer Bankers Ass'n at 9. *Accord*, American Bankers Ass'n at 5; Bank of America at 6; Household at 10. Even Sprint, with both wireline and PCS operations, acknowledges that "[d]evelopment in the industry . . . [has] made it more difficult to easily identify telephone numbers 'assigned to' cellular services." Sprint at 20. Sprint goes on to note that "a year from now, wireless number portability will make it almost impossible to know whether a number is being used in connection with a cellular service, as those assignments could change daily." *Id*.

Though some commenters offer bare claims to the contrary, they offer no analysis, instruction, or even anecdotal evidence to counter the notion that it is difficult, if not impossible, to distinguish between wireless and wireline telephone numbers, and that wireless number portability will only make it more difficult to do so. *E.g.*, City of Chicago at 13; PUCO at 22 ("telemarketers may be unknowingly calling wireless numbers that appear to be local exchange" numbers after the advent of number portability). For example, National Consumers League suggests that a "solution" would be "to use a technology that would enable telemarketers to distinguish between wireless and wireline phones." Predictably, though, National Consumers League offers

no insight as to just what that technology should be, or where or when it might be available. 155/ Similarly, Nextel claims that the Commission's rules should, "at a minimum, allow any number assigned to a wireless customer to be purged from a telemarketers' database," Nextel at 23-24, but it fails to suggest how this can be done with any degree of certainty.

Even where some parties offer more concrete suggestions, it is apparent that there is no mechanism currently in place that will allow telemarketers to determine with confidence whether a number is registered to a wireless or wireline phone. For example, the Cellular Telecommunications & Internet Association ("CTIA") indicates that it "would support access to the Interactive Voice Response ('IVR') system," but it also acknowledges that "telemarketers do not have access to the IVR system." CTIA at 6. And while "CTIA sees no compelling reason" to "limit access" to IVR, *id*. the fact remains that it is presently inaccessible by teleservices providers. Meanwhile, even Verizon Wireless notes that it "is not aware of any readily accessible technology that would allow a telemarketer to identify quickly which numbers that had originally been assigned to a landline customer have in fact been ported to a wireless number.

155/ ATA acknowledges that DMA claims "it has made arrangements to obtain . . . wireless area codes and exchanges data" to "help marketers identify and suppress calls to wireless phone numbers." DMA at 35. This approach may have worked somewhat in the past, to the extent wireless providers received their numbers in blocks of identifiable numbers. *See*, *e.g.*, *Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation,* 17 FCC Rcd 14972, 14973 (2002). However, with the advent of wireless number portability, the concept of "wireless area codes and exchanges" will lose meaning as formerly wireline numbers are assigned to wireless numbers alongside those from blocks of numbers dedicated to wireless use. *See id*. at 14981. Thus, consumer preference and demand will be the sole determinants of whether a given number is used for wireline or wireless services. It will therefore remain difficult, if not impossible, for teleservices providers to identify wireless phone numbers.

Without such a technology, "telemarketers have no way to 'track' a ported number to ensure that [it] continues to be used by a landline subscriber, making compliance impossible as a practical matter." Verizon Wireless at 12-13. WorldCom is similarly "unaware of any technological tools that would allow telemarketers to recognize numbers that have been ported from wireline to wireless phones or to recognize wireless numbers that have been assigned from a pool . . . that formerly were all wireline." WorldCom at 46.

The record thus supports subjecting teleservice calls to wireless phones and wireline residential phones to the same regulatory regime. It also supports the ideal that, if telemarketers are potentially subject to liability for any calls to wireless phones, there must be some exceptions to the rule. *See* ATA at 134-36. ATA thus agrees that there should be a good faith exception for inadvertent calls to wireless phones. *Cf.* Sprint at 22 ("it may take months after a number is ported [to a wireless phone] before all telemarketers can reasonably learn that fact and incorporate it into their telemarketing lists"). ATA also agrees that exceptions should apply in instances where a subscriber uses wireless as his or her sole telephone service, American General Financial Services at 1, and where the subscriber provides his or her wireless number as a contact number to a business. *Id*. *Accord* Bank of America at 6; Consumer Bankers Ass'n at 9; BellSouth 6-7. Finally, Sprint suggests, and ATA agrees, that the Commission should specify that when a landline customer changes from wireline to wireless service, but keeps the same phone number, the customer implicitly consents to the number continuing to be treated the same for telemarketing purposes. Sprint at 21. In short, "customers who are able to receive telemarketing

calls before they change . . . should continue to be able to receive those calls after they change, and that those who receive no telemarketing calls should likewise have that convenience continue." *Id*.

CONCLUSION

For the foregoing reasons, ATA respectfully submits that the Commission should retain the bulk of its existing rules under the TCPA, as described above. In particular, the FCC should retain its company-specific "do-not-call" requirement and reject the current proposal for a national "do-not-call" list. Otherwise, ATA suggests that certain rules should be modified, as set forth in these comments.

Respectfully submitted,

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